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Comparative Landowner Property Defenses Against Eminent Domain

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COMPARATIVE LANDOWNER PROPERTY DEFENSES AGAINST EMINENT DOMAIN

by

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ABSTRACT

This thesis evaluated the eminent domain laws of the top-ranking nations in property rights based on the World Economic Forum's Executive Opinion Survey: Singapore, New Zealand, and Switzerland. The United States is not top-ranking in property rights and serves as the base comparator given its history and jurisprudence on property. The thesis results prove the imprecision in measuring property rights without evaluating the substantive legal protections and the perceptions of the Survey participants. Switzerland appears to have the strongest quality and quantity of property safeguards. Switzerland is a federation with a long-standing history of subnational governments protecting landowner rights, similar to the United States. Switzerland may serve as the model eminent domain jurisdiction for civil code countries with parliamentary supremacy, and the U.S. may serve as the model jurisdiction for common law countries with constitutional supremacy. Although lacking in unamendable substantive protections, New Zealand and Singapore demonstrate that general property rights are not a prerequisite to legislating a stable, equitable eminent domain process that would mitigate the displacement of landowners. They introduce the baseline protections for common law or civil law countries, given how many judges enforce the eminent domain legislation without a challenge. The numerical value given to the top-ranking countries in the World Economic Forum's Executive Opinion Survey insufficiently reflects the substantive legal protections between other higher-performing countries. The specific numerical value awarded to each country should be given less persuasive authority in making nuanced comparisons on property rights between countries when the Survey is the primary data source of the comparison.

DEDICATION

To my parents, Dr. Leo & Theresa

To the landowners who experienced eminent domain abuse

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I want to thank all the people who helped me with this research and thesis. I formally thank my thesis committee for their guidance and support as I mastered this challenging legal area: Dr. Smit, Professor Elman, and Dr. Trudeau. They coached me on how to become a better attorney and legal scholar. Furthermore, I thank my family and friends for their encouragement throughout the completion of my research. Finally, I thank the many authors I have read and referenced to complete this thesis. Their hard work and willingness to share their knowledge has advanced the legal community. I truly appreciate their contributions.

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LIST OF ABBREVIATIONS

"WEF Survey"	World Economic Forum's *Executive Opinion Survey*
"Studied Nations"	A collective noun referring to Singapore, Switzerland, and New Zealand
"LAA"	*Land Acquisition Act* (Sing)
"Bill of Rights"	*New Zealand Bill of Rights Act 1990* (NZ) [only applicable in Chapter 4]
"Tribunal"	New Zealand Land Valuation Tribunal
"U.S."	United States [A common abbreviation for the country]

CHAPTER 1 – THE RESEARCH OBJECTIVES

This thesis evaluates the legal substance of the World Economic Forum's *Executive Opinion Survey* ("**WEF Survey**") results on property rights that the Heritage Foundation, Fraser Institute, and academic scholars implement in their research.[1] There is a small controversy about whether the economic freedom indices or the WEF Survey account for the improvement of property rights over time.[2] The research institutions have modified the data points and weights given to each criterion over the years.[3] This thesis will determine first whether higher ranks measuring *property rights* from the WEF Survey and economic freedom indices correspond to greater legal protections. Do higher rankings accurately reflect a legal regime that is more protective of private property rights? Second, based on this analysis of higher-ranked nations, how can the United States improve on the constitutional protection of property rights and compensation procedures for eminent domain proceedings? This thesis will analyze Singapore, Switzerland, and New Zealand (collectively known as the "**Studied Nations**") because they are the usual leaders when ranking countries for their property rights in the WEF Survey and the economic freedom indices.

The Empirical Questions. Specifically, the research will ask two questions:

(1) What substantive and procedural laws, arguments, and safeguards generate private property protections in the Studied Nations?[4]

(2) Do the Studied Nations have more or better laws protecting property rights compared to the United States? If yes, how could the United States combine the best landowner protections against eminent domain from the Studied Nations to create a preferred U.S. property rights regime?

Hypothesis. A country with a higher rank in reports measuring property rights probably has laws that protect property better compared to lower-ranking countries. Switzerland, Singapore, and New Zealand are ranked higher than the United States when measuring property rights. The alternative hypothesis is *Switzerland, Singapore, and New Zealand have more and/or better laws protecting property rights compared to the United States*. Even if this alternative hypothesis is proven false, the United States can learn how its eminent domain laws compare to the Studied Nations legislating their eminent domain power.

Research Methodology. This thesis shall evaluate the eminent domain laws in the three Studied Nations. Each country has legal research tools to facilitate the investigation of each country's laws. U.S. data was extracted from Westlaw, JSTOR, EBSCOhost, and ProQuest. Singapore data was extracted from JustisOne, Singapore Statutes Online, and the Land Acquisition Appeals Board. New Zealand data was extracted from Lexis Quicklaw, New Zealand Legal Information Institute, and specific New Zealand court websites. Switzerland data was extracted from Swisslex, the Federal Supreme Court's website with its case law search engine,[5] and some legislation on the Federal Council's website.[6] The data includes case law, statutes, ordinances, codes, and commentary. Many secondary sources assisted the data collection and interpretation of the Studied Nations' laws and cultures: e.g., treatises, books, journal papers, and government websites.

This thesis covers a constructive portion of the eminent domain laws; however, it does not intend, nor is there enough pages,[7] to be a comprehensive treatise on the topics within the Studied Nations. Instead, the researcher intends to identify some of the important legal rules, procedures,

and defenses from the landowner-condemnee's perspective with the objective of preserving private property interests with respect to each Studied Nations' eminent domain power and police powers.

This thesis is also not concerned with the cantonal level protections found in Swiss cantonal constitutions, expropriation legislation, and case law. Swiss case law is relied upon with limited authoritativeness since Switzerland has a civil law system. No domestic courts can contest legislation of the Federal Assembly or Federal Council, meaning the courts lack a judicial review power to overturn laws as unconstitutional.[8] However, the legislature can assign certain matters for judicial review, and the courts can ensure conformity with the laws and the constitution generally.[9] The legislature ratifies constitutional objects, while the courts manage the administration and compliance of those objects.[10] Nonetheless, the courts did contribute to the creation of Swiss property rights. The Federal Supreme Court established the federal property rights framework by a tenacious application of the cantons' constitutional property protections.[11] Furthermore, federal and cantonal authorities can refuse to apply federal legislation if they find the specific application contravenes the constitution.[12]

Comparative legal research helps attorneys see how other legal systems answer and rationalize legal problems, which sharpens the depth and application of laws within other jurisdiction.[13] There are many barriers to fulfilling comparative legal research. The source-country's law libraries are the best sources of that foreign law, not the local law library.[14] Computer-assisted legal research,[15] interlibrary loans, and other technological services have substantially improved worldwide access, readability, and recordation of foreign law.[16] Other difficulties of comparative research include the political and historical backgrounds of each country-comparator and the knowledge of each society's prevailing attitude towards the law.[17] These insights extend beyond the needs of the domestic practitioner looking for foreign authority

on a matter;[18] nonetheless, the lack of funding or resources to explain the culture omits other interesting comparative findings.[19] A specific comparative property law issue is indigenous history and property rights. Indigenous land rights may vary greatly based on the federal government's treatment of aboriginal title.[20] Some countries may acknowledge competing land claims between aboriginal title and the general title registration systems:[21] either the Torrens system or the recording system.[22]

For the United States, the subnational governments are the forefront users of eminent domain.[23] Thus, this thesis shall evaluate and review one state's eminent domain laws alongside the federal eminent domain minimum standard. Alabama has been selected as the base-comparator subnational jurisdiction because Alabama has been ranked first in land-use freedom under the Cato Institute's *Freedom in the 50 States*, even when the land-use freedom ranking is selected to measure only eminent domain criteria.[24] Alabama is the only state to have fully adopted the Uniform Law Commission's *Eminent Domain Code*.[25] The subnational evaluation will mention other states that are outliers in landowner defenses.

Outline of This Thesis. The paper is subdivided into six chapters. Chapter 2 is the literature review, briefing the current research findings and rankings on comparative property rights from the WEF Survey, Heritage Foundation, and other research. The background of the United States and Alabama takings law establishes the legal foundation we hope to improve. Within the background, we will discuss the constitutional, compensatory, and due process property protections.

Subsequently, the Studied Nations will be compared on three broad categories: constitutional protections, compensation structure, and protections found in the nation's statutes, common law, or legal culture. Each Studied Nation will have a chapter devoted to it: Singapore is

Chapter 3, New Zealand is Chapter 4, and Switzerland is Chapter 5. All Studied Nations have a constitution and primary legislation controlling expropriation procedures, and these chapters will reveal whether the eminent domain powers are unrestrained or procedurally burdenless. The chapters will survey the legal opportunities landowners have to restore their economic position after forfeiting realty towards the government's objective. The noteworthy similarities or distinctions between a Studied Nation and the United States, if any, will be mentioned in the final chapter or briefly in each Studied Nation's respective chapter to mitigate redundancy.

Chapter 6, entitled *Discussion*, summarizes the author's findings and personal observation during the research. Specifically, the Discussion answers (1) how the United States could provide better substantive or procedural property rights based on the laws in New Zealand, Switzerland, and Singapore, and (2) what laws in the Studied Nation and the United States would consolidate into the best legal characteristics of each nation? Consolidating the legal principles that make the country preferable for landowner-condemnees undergoing expropriations should improve any country's rankings in property rights, including the United States.

CHAPTER 2 – LITERATURE REVIEW & THE BASE COMPARATOR

Background. The Fraser Institute,[26] Heritage Foundation,[27] Cato Institute,[28] and the Property Rights Alliance[29] reported that the United States has gradually declined in their property rights rankings on numerous Economic Freedom Indices, while other countries have surpassed the United States since the early mid-2000s. Economic Freedom is polysemous and includes concepts such as "personal choice, voluntary exchange, freedom to enter markets and compete, and security of the person and privately owned property."[30] Advocates of economic freedom presume "individuals know their needs and desires best and that a self-directed life, guided by one's own

philosophies and priorities rather than those of a government or technocratic elite, is the foundation of a fulfilling existence."[31]

Economic Freedom Indices assess numerous criteria when computing a nation's overall property rights, including, but not limited to, physical property rights, intellectual property rights, and the legal enforcement of contracts.[32] Overall, the Indices find Singapore, Switzerland, and New Zealand as the best facilitators of private property protections.[33] For some Indices, the United States does not rank in the top 20 countries.[34] Each economic freedom or property rights index derives its property rights data, all or in part, from the World Economic Forum's annual *Global Competitiveness Report*, which analyzes the results of the annual WEF Survey.[35] The WEF Survey asks only one question to gauge the integrity of a nation's property rights, and participants answer by selecting a number between 1 through 7:[36] a Likert scale.[37] The WEF Survey's property rights question asks:

> In your country, to what extent are property rights, including financial assets, protected? [1 = not at all; 7 = to a great extent][38]

For 2018, the WEF Survey consisted of 12,274 responses from business executives located in 134 economies.[39] For 2019, the same question was answered by a WEF Survey of 12,987 business executives in 134 economies.[40] The Global Competitiveness Report has successfully maintained its credibility as "the longest-running and most extensive survey of its kind,"[41] which explains why other research institutions would trust the Report's data in their studies.

Many variables affect the actual and perceived security that the government shall enforce private property protections and render a restitutionary remedy for the harmed property owner when the government expropriates the land. Business culture, bribery, judicial impartiality, discriminatory selection in taking the land, the cost and time of appealing expropriations, and the

conferred legal protections can bolster or limit proprietors defending their property.[42] This thesis will compare the substantive laws of top-ranking countries in property rights against the United States. The United States is a major economic powerhouse given its gross domestic product, market size, and the ease of doing business.[43] However, the United States is a distant competitor from the top-ranking Studied Nations concerning property rights, although it has a constitutional property defense.[44] These characteristics make the United States a meaningful base-comparator; the nation is a developed market that could improve its eminent domain laws without overturning its legal ordering. The Studied Nations were selected because of their high, undefeated ranks in property rights per the WEF Survey, the diminutive comparative property law research on the Studied Nations within the United States, and the available legal resources to conduct the research. Indisputably, the Studied Nations and the United States have vastly different legal institutions, cultures, population sizes, land areas, histories, government structures, and policy considerations. These distinctions do not hamper the Studied Nations from being the most competitive and economically free countries in the world – sometimes surpassing the United States.[45]

Eminent Domain Expectations & The Compromises of Property Rights. Eminent domain exists to implement a public advantage that is not despotic[46] or taking only what is necessary to operate the country.[47] What society considers an advantage to the general public has shifted with time,[48] and humanity's continuous affirmation of the government's eminent domain power derives from culture, tradition, and political necessity rather than an economic evaluation.[49] The government body or head of state, possessing the most power, controls the land given its direct threat of force on its proprietors, whether or not the power is carried out.[50] Nonetheless, eminent domain serves a vital objective: to avoid a single seller from obstructing the installation of infrastructure for common carriers,[51] assuming the seller cannot partner with the common carrier's

development or lease the right-of-way.[52] If beneficiaries of the public good are identifiable and less than the whole community, then a tax assessing those individuals would be ideal.[53] Utility lines or railroads have fewer options since thousands of individuals benefit from those services. One landowner may request more money to voluntarily execute a right-of-way, frustrating development and causing the creation of a more expensive, alternative route that raises the transaction costs of the utility and the consumer prices for service.[54] The utility company must pay the one landowner – the *holdout* – more consideration to maintain the shortest, convenient path or pay more development costs to reroute the utility line to the intended destination for the public's consumption. Failing to install basic utilities on residential or commercial buildings may paralyze economic growth due to the outdated or missing land improvements – e.g., the buildings have no electricity or internet access.[55] High transaction costs may also induce the common carrier to abandon servicing lands beyond the holdout.[56]

Conversely, overbroad public use standards invite degradation of property rights for unnecessary reasons or coercive transfers from the smaller landowners to the economically or politically powerful.[57] If the threat of expropriation can reduce property values, the expropriator may holdout the land acquisition to realize the reduction in compensation.[58] Besides eminent domain abuse, there is no empirical conclusion that eminent domain generates more economic efficiency compared to the free market in all cases.[59] Eminent domain is a compromise between the government's axiomatic duty to serve common societal needs and to respect private property rights, generally, while indemnifying landowners for property infringements that advance those common needs.[60] Although the eminent domain power is customarily absolute, a free society restricts the scope of the government's power to situations where it will fulfill a societal need

efficiently, which excludes expropriations for the betterment of private interests or tyrannical objectives.[61]

Measuring Substantive Property Rights. For purposes of this thesis, a pro-landowner eminent domain system is assessed on two factors: (1) the ease of exercising or delegating the eminent domain power, and (2) the quality of the landowner-victim's compensation for the taking and ancillary injuries. Regarding the first factor, a constitution or statute may confine the government's expropriation power to certain public works. The power may have a precondition that the government owns the property after the taking, or the citizenry can access or benefit from the expropriated land.[62] The ease of exercising the power may have procedural requirements, prolonging the power's utility or threatening the project's legitimacy in court. Regarding the second factor, compensation rights indemnifies landowners, a minority economic group, against arbitrary government actions, and it promises the government's good faith, fair-dealing when the government forces an individual to bear an overwhelming public burden.[63] The quality of the landowner's compensation determines a government's honesty when intruding on private property or whether the compensation deters government interference with the landowner's business or livelihood on the land.[64] Specifically, a government promising full compensation yet relies on a loophole to elude paying compensation proves dishonest government fair-dealings with its people. Meanwhile, a government that promises an unspecified range of compensation may lawfully pay below fair-market value for any project. The government has little risk when expropriating land for a legitimate, ordinary public use, and landowners have endless reasons to fear investing in a property with a foreseeable expropriation risk. If a government has no limitations on exercising eminent domain and no specified compensation awards, a government could legally expropriate a newly constructed building from a private individual for an agency's use and pay compensation

below the building development costs. Albeit coincidental that the government expropriated the building near the building's completion, the landowner would struggle proving the government's mala fides from the beginning.

Statement of the Situation & Test Case. In the United States, the doctrinal hindrance of property protections arose, most recently, from the U.S. Supreme Court case, *Kelo v. City of New London*.[65] The Court held that the local government could expropriate property from the immediate private landowner for conveyance to a different private individual if the expropriation served a public use.[66] The Court stated that the sovereign could not use its eminent domain powers to expropriate land from one private property owner to give to another private individual for that other individual's sole benefit or "under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit."[67] Although public use and public purpose have historically been different terms or antonyms,[68] the Court adopted the modern, broader interpretation of making *public use* synonymous with *public purpose*.[69] Some state courts find questioning the public purpose to be irrelevant once the government asserts its purpose.[70] We will see that this absolute deference to the government is the prevalent international interpretation. In *Kelo*, the majority opinion failed to limit the modern public use doctrine.[71] The government has no obligation to oversee the expropriated property's conversion into the public use or to hold the private beneficiary of the expropriation accountable for achieving the claimed public use in the approved plan to expropriate the land.[72] Under the existing legal framework, the private beneficiary could immediately abandon the public use without penalties.[73] The private beneficiaries in *Kelo*'s confiscation and in *Kelo*'s predecessor[74] never completed their anticipated redevelopment projects.[75] Preexisting businesses and homes were lost with no replacement.[76] Some states allow a grace period for the victim to repurchase their expropriated property,[77] but

this presumes the compensation was not consumed in the victim's purchase of a new domicile or the victim had saved sufficient funds to relocate, find new employment, and repurchase the property. The expropriated land may appreciate in value when the government offers the victim a right of first refusal to repurchase the land. Converting a residence into a commercial operation would amplify the land value for investors. If the victim had to pay full market value to repurchase the property, the victim must pay above her compensation award and restoration costs.

The Supreme Court also found a corporation vaguely promising increased tax revenues and new jobs after expropriating the land could qualify as a public use.[78] Practically, private-to-private takings are constitutional if predicated on producing a secondary benefit for the public under a redevelopment plan producing aesthetic pleasure or economic revitalization.[79] Justice Thomas marked the factual distinction between *Kelo* and its predecessors, "There [was] no allegation that any of these properties [were] blighted or otherwise in poor condition; rather, they were condemned only because they happen to be located in the development area."[80] The courts do not review the efficacy of the government's development plan if it appears comprehensive[81] or stems from a legislative economic policy.[82]

The indigent property owner faces a greater risk of the government taking their property due to this ruling and the continued use of blight condemnation to justify the expropriation.[83] *Blight* or *slum clearance* is legal parlance for land that is detrimental to public health-and-safety and creates an economic liability.[84] The properties are usually dilapidated, abandoned, or unsanitary.[85] Blight statutes are associated with a municipality's police power or eminent domain power to "transform an entire slum area into a wholesome section of the community[.]"[86] A municipality prefers to classify areas as blight with ease because completing a plan to revitalize the local economy or improve public safety requires years of effort.[87] Objective criteria hinders

discriminatory rulings about whether realty qualifies as blight,[88] yet most statutes defining *blight* include criteria beyond the landowner's control, which inhibits private landowner action attempting to cure the blight of her land and the community.[89] The government can also expropriate non-blight properties near slums if the municipality finds those properties necessary for redevelopment plans.[90] The government is not federally obligated to redraft the redevelopment plan to carve out non-blight property.[91] In opposition, states that follow a narrow "public use" definition find the condemnation of non-blight property in a redevelopment plan unconstitutional[92] because blight condemnations can be parcel-by-parcel questions.[93] A narrow "public use" definition constrains expropriations to usage or rights to use by the public, and establishes fixed guideposts for reexamining legislative and judicial action, unswayed by popular feelings or judicial temperaments.[94]

Returning to the *Kelo* decision, it accelerated the use of eminent domain across America to replace "lower tax producing businesses for higher tax producing ones[.]"[95] Further, there is evidence of government employees' vindictive harassment towards the recalcitrant landowners in *Kelo*,[96] and no compensation amount can excuse mistreatment to family and communities, delegitimizing the eminent domain power.[97] Constitutionally, *Kelo* created a loophole for private-to-private takings of non-blight property for private development without judicial criticism.[98] It undermines the overwhelming cultural and legal authority holding private-to-private takings as unconstitutional.[99]

To remedy the public abhorrence of the *Kelo* decision,[100] many states enacted eminent domain reform legislation, which produced illusory solutions.[101] In the U.S., the subnational governments can legislate greater protections or more stringent governmental constraints than the federal constitution's minimum requirements only if the states do not eliminate the minimum

federal protections.[102] The subnational governments can constitutionally enact independent or superior rights beyond the federal government because (1) federal laws does not answer every legal issue, the Supremacy Clause cannot preempt state law when Congress has not enacted laws about that issue; (2) many legal powers are delegated to the states through the Tenth Amendment, (3) some powers are exclusive to the states, and (4) additional rights that comply or exceed the available federal rights do not counterpoise those federal rights.[103] With the federal government's acquiescence, the states have numerous reasons to gain additional constitutional rights and create independent state constitutional analyses based on "(1) [the state constitution's] textual language; (2) differences in the texts; (3) [the state's] constitutional history; (4) preexisting state law; (5) structural differences [between the federal and state constitutions]; and (6) matters of particular state or local concern."[104] Therefore, the States can narrow the public use interpretation accepted by the U.S. Supreme Court because it is not providing less than the minimum federal requirements – due process and compensation when property is taken for a public use.[105]

The Economic Freedom Indices' conclusions about U.S. property rights correlate with the literature on U.S. eminent domain jurisprudence. According to Andre LeDuc, U.S. eminent domain law "appears unpredictable, unprincipled, replete with doctrinal anomalies [state-by-state], and infested with seemingly arbitrary distinctions."[106] The disparity in property treatment conflicts with U.S. legal history. American jurists pioneered the maxim that the power to take property from one private individual to give to another was against all reason and justice, and the legislative branch cannot be trusted with such a power.[107] Nonetheless, the new American trend is not unique. Courts worldwide also evaluate property rights as less important than other rights.[108]

History. Eminent Domain in the United States is an ancient doctrine enforceable at the federal, state, and local levels.[109] Every government has an inherent authority to control property

within its jurisdiction, subject to preemptive limitations:[110] such as paying the losses incurred to the injured person.[111] In Colonial America, property rights received little respect. States would take property if it was not fenced off and used productively.[112] Under the Mill Acts, riparian landowners were forced to execute leases, for less than fair market value, to any person offering to build a grist mill along the water.[113] The Founders reinvented stronger property rights than what was practiced in the new United States.[114] The United States had to evolve over generations to recognize the Founder's intended vision and for the federal constitution to become a compliance burden on the states.[115] The states granted more protections and broader compensation methods than the minimum federal protections when the state or its municipalities exercise eminent domain.[116] The federal constitution limits all expropriation actions by restricting expropriations to public uses (now, *public purposes* under the common law) by guaranteeing the landowner-condemnee just compensation,[117] and by guaranteeing due process under the law when the expropriator deprives the landowner of her property.[118] As noted above, in the wake of *Kelo*, a few states amended their constitutions to ensure state agencies and local governments shall not abuse the liberal eminent domain power granted by the Supreme Court's rulings.[119] The effectiveness of these reform efforts may serve only as a parchment right, yielding no actual security from government takings.[120] For example, state governments can circumvent the state's limitations on taking for increasing tax revenues by using a different broad public use justification or declaring the subject properties as "blight."[121] If a land-use project for a private company requires more land than the original taking of blight property, a broad blight statute can incorporate non-blight and non-income-generating property into the condemnation, yielding greater tax revenues for the local governments.[122]

The permissible justifications for private-to-private takings have drastically changed. Historically, the U.S. Supreme Court held a Fourteenth Amendment due process violation occurred when the government takes property from a private person only to convey the expropriated land to another private person, who can benefit from the expropriated land and exclude public access to the premises.[123] *Kelo* prohibits private-to-private takings with exceptions. Private-to-private takings are unconstitutional when the private beneficiary of the condemnation is the only person benefiting from the taking[124] or when a public benefit is a pretext for a purely private benefit.[125] The private beneficiary paying more property taxes or greater community employment in the future ensures that private-to-private transfers never solely benefit the beneficiary. The municipality enjoys the increased public revenue or potential job growth, or both. *Kelo*'s rejection of the narrow public use test allowed takings where it *could* generate an ancillary benefit to the public.[126] Therefore, under the modern interpretation, a private entity can enjoy the immense benefits of the taking only if the government-expropriator acquires some kind of indirect benefit.[127] What indirect benefits qualify as *de minimis* remains ill-defined.[128] Private-to-private expropriations will most likely succeed because every government entity receives tax revenues regardless of which private person owns the land[129] unless the developer receives a tax rebate with the conveyance.[130]

When the private party receives all the bundle of rights, privileges, liabilities, and immunities,[131] the private-to-private taking truly promotes the private beneficiary's interests, for the beneficiary incurs no additional encumbrance than if she entered a voluntary purchase – both an expropriation or land-sale require annual property taxes from the end-user.[132] A lower judicial standard of review for exercising the eminent domain power unburdens most legislative interpretations of a public use.[133] The other reasons for granting private-to-private takings include

the expediency at achieving the public use,[134] and the removal of blight or slums that are injurious to the public's health and safety.[135] Purchasing the property via voluntary transactions can be more expensive than expropriation as well.[136] The municipality may find a prospective business incommensurable to the land's current use or more profitable than another business.[137] In less populated states, eminent domain projects may promote internal migration – citizens moving to the different states for new employment due to the redevelopment plan – or create the preliminary infrastructure to access untapped state resources: e.g., refining and transporting gas. However, the private beneficiaries would relentlessly preserve their government-bestowed wealth to the original landowner's detriment.[138] Wyoming, a sparsely populated U.S. state, had a history of inequity when landowners confronted expropriation. "[S]urveyors would enter their property without permission, landmen would make low offers and threaten litigation, and projects would divide lands and impair views. Juries recognized these damages and would award substantial verdicts for the [condemnees], only to have them overturned."[139] The Wyoming Supreme Court once ordered a mistrial when a jury's compensation verdict exceeded the market data for the property and factored the condemnee's loss of business, subjective value of the property, and issues with trespassers.[140]

More disconcerting is the U.S. Supreme Court's long-standing tolerance towards a state's forced sale of property that landowners would otherwise not sell.[141] An important predecessor of *Kelo* was a case called *Midkiff*. In the *Midkiff* case, Hawaii enacted a law that forced large landowners to sell the land they were leasing to their lessees.[142] The Polynesian immigrants who settled in Hawaii brought their feudal land tenure system to Hawaii.[143] When America divided the feudal land to create a new U.S. state, their distribution efforts resulted in 72 people owning all of Hawaii's privately owned land.[144]

The former nation's politicians had redistributed the now-American land amongst themselves and employed their advantageous political position to retain or acquire wealth under the new legal order.[145] The U.S. Supreme Court held the land oligopoly – composed of the feudal monarchs before Hawaii became a State – created the social evil of no purchasable land in Hawaii: none of the 72 landowners would sell their land when they could lease it at a profit.[146] Here, the state government is curing the politically entrenched division of land at Hawaii's germination as a state.[147]

The Supreme Court approved the state's forced sale on a dubious ground: Hawaii expropriated land to correct a market failure or deficiency.[148] This rationale transitioned the private-to-private taking justification from redressing a sovereignty reorganization problem to market forces. Dividing a former feudal or monarchial government into state land is a rare event. Exceptions would include the sale or competitive bidding of government land[149] or when the U.S. acquires more land from another country. The disparity in property ownership because of market demand is ongoing across America.[150] National Public Radio recently reported: "fewer homes for sale in the U.S. [in 2020] than ever recorded in data going back nearly 40 years."[151] Summarily, the Court permits expropriation to reduce the concentration of land ownership regardless of whether the landowner purchased the land without political entrenchment.[152] Taking property from a landowner to give to a tenant in a scarce market for the tenant's exclusive private use qualified as a public use.[153] Thus, mere intelligent land investments, saving money to buy large parcels throughout many generations, or sizeable lease firms justify the government to expropriate the property when the landowner refuses to sell the land. The government's reasoning finds inactivity in the market constitutes a market deficiency as land is not a reproducible resource, and an unwillingness to sell reduces the supply of land available for purchase.[154] In *Midkiff*, the oligopoly

had competitive pricing, so the rising consumer demand and Hawaii's geographical constraints contributed to the housing shortage and significant tax implications, not alleged monopolistic greed.[155] Unfortunately, the state could discard the actual cause or other factors impacting market supply, such as zoning regulations obstructing multifamily building expansions,[156] and instead, expropriate land to promote the state's objective.[157] The state's objective *could* be achieved since forced transfers of an unwilling seller's land would increase the housing supply for people other than the landowner. Therefore, a refusal to sell affords a weak defense against private-to-private takings.[158] *Kelo* cemented private-to-private takings under the broad public use test for when landowners refuse to sell their property to a private person for the public's indirect benefit from the new private activity.[159]

The Base Comparator: The United States & Its Constitutional Laws

Background. Constitutional rights are considered absolute, and all future federal and subnational governments must enforce those rights.[160] The Framers of the U.S. Constitution expressly decreed private property as imperative to the preservation of life, personal freedom, and self-determination.[161] Property rights covered more natural rights than the enumerated individual liberties.[162] The citizenry wielded a right to their property and a property interest in their rights: i.e., a double-layered constitutional defense.[163] Constitutional rights police government actions[164] and shield individuals from those actions except when compelling interests overpowers the constitutional scrutiny under the metaphorical shield.[165] Unlike general statutes, U.S. constitutional rights are difficult to alter,[166] and statutory infringements on constitutional rights are subject to strict judicial scrutiny.[167] For individuals, a constitutional protection preserves the individual's best legal defense against government action[168] or against parliamentary supremacy

that could repeal the defense or circumvent the right with a new law.[169] Under constitutional supremacy, the constitution is the supreme law of the nation that voids all contradictory laws.[170] Legislatures have regulated matters concerning constitutional rights, which debase the right's absoluteness.[171] However, a regulation must not destroy the constitutional guarantee.[172] The regulation can debase rights; they must not abolish the right, but they can obstruct the right's former utility. The federal constitutional rights for property are the Fifth Amendment's Takings Clause and the Fifth and Fourteenth Amendment's Due Process Clauses.[173]

The Takings Clause. The federal constitution's Fifth Amendment guarantees landowners compensation for invasions of their property interests or deprivations of all economically beneficial use.[174] The property can be intangible, personal, or real property.[175] The Fifth Amendment imposed a moral obligation on the government to pay for its interference with privately-owned property to benefit society.[176] Imposing morals counteracts the government's inherent eminent domain power to take property for the public's use or benefit.[177] Property shall only be taken for a public use,[178] but as discussed above, the public use test has been overbroad to allow in essence private-to-private takings, dampening the precondition's effectiveness.[179]

When one person bears the public burden by surrendering more than what is expected from other members of the public, the government must indemnify the landowner with a full and just compensation award.[180] Traditionally, the true value of the land must be paid with compound interest to compensate delaying the expropriation, which devalues the property and deters further land productivity.[181] The modern trend holds a *just* amount of compensation as dependent on equitable principles and fairness, not conclusively full market value.[182] The landowner's property rights are satisfied after the price of the taking is received, under the U.S. Supreme Court's

standard.[183] The U.S. government has counterargued that the full indemnity can constitute a manifest injustice.[184]

Landowners can claim a federal and state constitutional violation of their right to compensation, although state courts can only issue a binding answer to the state constitutional law question.[185] The federal constitution's mandate for just compensation applies to state or local governments exercising an eminent domain power.[186] The economic impact of regulations on property could cause an injury that warrants compensation for equity and fairness purposes.[187] Failing to compensate landowners for the state's economic injuries, such as regulatory takings, may create a taking if the landowner bears a particularized loss at society's alleged benefit.[188] Property interferences can oblige compensation in only extreme circumstances, and the norm affords great deference to land-use regulations without compensation for reduced land values, business loses, or relocation costs.[189] Repealing an ordinance that stopped the landowner's economic activity on the property or returning the property to the landowner makes the once-permanent taking temporary.[190] Temporary takings complaints rectify the landowner's deprived time to use and profit from the land.[191] There is no definite formula to compute temporary takings.[192]

The Due Process Clauses. Before 2019, landowners suing a state or local government for a federal constitutional violation had to exhaust all state law remedies and procedures before litigating in federal court.[193] Often, state proceedings would exhaust the landowner with excessive court costs and time.[194] Suppose the claim was defeated in state court, the federal court could not answer the landowner's federal Fifth Amendment question under *res judicata*: which bars the relitigation of a proceeding that a court has already heard and decided.[195] To end the procedural

impasse, in 2019, the U.S. Supreme Court granted landowners the option to sue state officials directly in Federal District Court for deprivation of their federal constitutional property rights.[196]

At the surface, the U.S. considers property and liberty as equally worthy of procedural due process protections under the federal constitution's Fifth and Fourteenth Amendments.[197] However, the modern trend affords fewer safeguards for property compared to other freedoms.[198] The federal constitution's Due Process Clauses command the creation of a fair procedure or an opportunity for a hearing.[199] Both are orthodox, practical principles to defend property interests in a common law system,[200] but the Due Process Clauses cannot halt all state procedural injustices.[201] For example, the state government's failure to give an interested party notice of a hearing resulting in the property value declining did not qualify as a deprivation of property without due process.[202] What is lawful does not make the action culturally accepted. Many state courts create common law procedural rules when the state legislature abstains from enacting notice requirements or pre-condemnation hearings.[203] State law formulates the elements of property within its jurisdiction,[204] and to benefit all landowners, states cannot abolish a right to property arbitrarily or contravene the fundamental rights to property and justice.[205]

The State & Local Protections. Whether a state supplemented the federal constitutional protections under their state constitutions or through a state statute, the legal protection's position in the legal hierarchy impacts its permanency and exposure to alterations.

Constitutions. Each state has particularized defenses and remedies in their Constitutions, and their effectiveness of pro-landowner defenses deviate from state-to-state. For illustration, Louisiana's constitution deters the *Kelo* ruling by prohibiting private-to-private transactions and expropriations for a *predominantly* private use or for enhancing tax revenues.[206] However,

expropriations for the benefit of private entities persist when the expropriation to the private entity eliminates blight property.[207] In some states, a landowner could request a jury to adjudicate the justness of the compensation award, and just compensation could extend beyond the federal constitutional standard with the addition of relocation and inconvenience costs.[208] The Michigan Constitution demands compensation to be no less than 125% of the expropriated land's fair market value,[209] the Virginia Constitution grants compensation for lost profits and lost access to the land,[210] and the Montana Constitution allows landowners to recover attorney fees, expert witness fees, exhibit costs, and court costs as compensation if the court rules in favor of the landowner's claim, e.g. challenging the exercise of eminent domain or the compensation award.[211] Besides these remarkable states, the majority of state constitutions reiterate the federal constitution's Fifth Amendment protection without supplementing the standard in favor of landowners.[212] Even in the brief history when some states did not have a constitutional right to property and the Fourteenth Amendment did not force the Takings Clause on the states, the common law upheld a compensation requirement with the exception of South Carolina.[213]

State laws that directly conflict with the federal constitution are unconstitutional given federal preemption of state law.[214] If a State fails to furnish just compensation, due process, or equal treatment rights, then no independent state constitutional analysis can avoid the *prima facie* conflict with the federal constitution.[215] In *First English Lutheran Church of Glendale*, the California court found a municipal ordinance authorizing an expropriation to be unconstitutional, but the government failed to compensate the landowners for the temporary taking.[216] Voiding an unconstitutional taking ordinance is not an adequate federal remedy for expropriations.[217] The government must pay compensation for the temporary taking because it conducted work on the land, stopping all economic viable uses, pursuant to that voided ordinance.[218] A State that enacts

more liberties than the federal constitution cures the defects of the federal constitution, such as the inequities generated under a broader *public use* interpretation.[219] Therefore, supplementing federal constitutional rights without abating those federal rights synchronizes federal and state laws towards a unified principle of preserving property rights.[220]

Other Compensation Factors. A government actor controlling the land without paying compensation allows the landowner to recover trespass damages,[221] and compensation in eminent domain.[222] A court may reject a trespass claim under the state's sovereign immunity or a legislatively recognized inverse condemnation statute, which creates a separate action with fewer landowner remedies.[223] Nevertheless, practitioners could argue that private entities condemning or benefiting from the condemnation lack an eminent domain power, state sovereign immunity, or both.[224] The landowner would petition for an *ultra vires* review of the private entity's conformity with their legislatively granted authority.[225]

Landowners can enroll in relocation assistance programs at the federal or state level, if eligible, to reimburse moving expenses,[226] reestablish a relocated business[227] or replace a residence.[228] The *Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970* promogulated non-binding best practices for federal agencies or federally funded projects displacing landowners.[229] Landowners have no rights or cause of action when an agency fails to comply with the policies.[230] When a state mirrors the Act's provision and excludes that disclaimer limiting the landowner's rights, the state agency is obligated to comply with all the best practices,[231] or a state court could interpret the Act's disclaimer as limited to the Act's moving and replacement housing expenses.[232] States relocation assistance includes relinquishing commercial property or alternative housing.[233] Moreover, a Federal Agency should not accept property from a State[234] unless the Federal Agency reimbursed the landowner for her legal costs to transfer the

property, any penalties on existing mortgages,[235] and possibly litigation and attorney fees.[236] The Agency must attempt to comply with the Congressional policy on eminent domain practices, even when it relies on the State's eminent domain power.[237] Analogously, a State cannot receive federal funds for the eminent domain project[238] unless, when requested, the State reimbursed the landowner's moving expenses, searching costs for a replacement business or farm, replacement housing, and legal costs for purchasing or entering the replacement dwelling.[239] At its discretion, the State may provide relocation services to landowners abutting the project who will incur a substantial economic injury from the project.[240]

Alabama & the Eminent Domain Code. Alabama ratified the Model Eminent Domain Code[241] and other rules that resulted in Alabama being ranked first in land-use freedom.[242] Alabama is less likely to use eminent domain than many other regions in the United States,[243] it banned economic, private eminent domain rationales, and it restricted the definition of *blight* despite having no history of private-to-private takings.[244] With the intent of overturning *Kelo* and *Midkiff*, the Alabama legislature made the following public uses impermissible: condemning property for future "retail, office, commercial, residential, or industrial development or use[;]"[245] enhancing tax revenues; and transferring property to private persons.[246] The trickle-down benefits of economic developments fail to satisfy the state constitutional public use precondition.[247] Whether a property constitutes blight is a parcel-by-parcel question;[248] otherwise, a landowner who complied with the building laws would receive the same punishment as her recalcitrant neighbor.[249]

Other state outliers outshine Alabama's high-ranking eminent domain reforms. Florida and New Mexico banned the local government's eminent domain power to eliminate blighted property,[250] where Florida promotes the local government's inherent power-to-abate-nuisances to

combat health and safety issues instead of the eminent domain power.[251] Commentators also concluded that Alabama's blight definition is not sufficiently restrictive to stop *Kelo*-style takings.[252] Alabama follows the majority rule that does not exempt agriculture from zoning regulation and fails to preserve agricultural land as widely as other states.[253] Compare that to Kansas where agricultural land is exempt from most zoning requirements,[254] and Oregon where farmland and its structures are given preferential treatment over urban planning.[255] Oregon statutes compensate for the reduction in fair market value caused by regulations for residential, farming, and forestry activities.[256] Compensation previously applied to all Oregon properties, but the legislature amended the statute to exclude commercial properties.[257] Nonexclusive agricultural preservation zoning is preferable since the landowner can build structures on the land without issue, incur less administrative costs than exclusive agricultural zoning, and voluntarily change the land's zoning if the nonfarm uses outbalance the land's agricultural use.[258] If Alabamian local governments enforced their power-to-abate-nuisances instead of using the eminent domain power, the "right to farm" nuisance exemption would protect more farmers from expropriation due to their operations being alleged nuisances.[259] Alabama rarely expropriates farmland, but under those circumstances, the courts would deny entry onto any farmland until the crops were harvested,[260] or the landowner was reimbursed for the destruction.[261]

Regulatory Takings. Richard Epstein's book, *Takings*, discussed the injustice of expropriating property without compensating for the condemnee's other losses derived from the taking.[262] Alabama's Constitution fails to remedy all consequential damages, but the landowner and abutting landowners can sue municipalities for inverse condemnation when the government takes or injures any other private property during an expropriation or public improvement.[263] However, unlike most states, the Alabama Supreme Court does not extend the protection to

regulatory takings[264] unless the regulation caused a physical taking, injury, or destruction of the property.[265] For instance, government-contracted construction of a breakwater and marsh that killed the farmers' shoreline oysters – due to excess sediment and silt deposits – produced a compensable injury against chattels and the existing shoreline easement.[266] The Alabama Constitution and U.S. Constitution are worded differently, but the Alabama Supreme Court saw no reason to deviate from the federal doctrine, which repudiates regulatory takings as compensable.[267]

The Alabama Supreme Court strictly construed that landowners cannot recover compensation for the property's restricted use without a statute providing compensation for the government's exercise of the zoning power.[268] Compare Alabama to Florida, where Floridian courts treat economically debilitating regulations[269] and blocking travel for certain vehicles[270] as compensable regulatory takings. Likewise, forcing landowners to confer a public benefit qualifies as a taking.[271] In North Dakota, a landowner who undertakes significant expenditures improving her property, in reliance upon existing zoning laws, may petition for compensation when the new zoning regulations forbid all reasonable use of the property.[272] Losing a property's economically viable use has become a state-by-state question into whether the State law recognizes the specific property interest that has lost some or all of its economic value.[273]

Quick-takings[274] are common, but the expropriator must pay a court bond of the court-estimated injury to the property and substantial interference of the landowner's possession and use of the property.[275] The bond should fund the landowner's restoration efforts and court costs if she wins on appeal. If the expropriator prevails in the Circuit Court's condemnation order, the expropriator may survey, construct, and use the land for the stated public purpose despite the landowner appealing the order.[276] The expropriator will need to pay the assessed compensation

before using the property with imperfect title.[277] Landowners should seek compensation for the delayed compensation payment, when an appeal is raised, through prejudgment interests.[278]

Public use is limited to the public's use. Historically, private ownership of a public work invoked an unconstitutional private use, and the legislature could not convert a private use into a public use by legislative order.[279] The Alabama Courts mandated that a public use must mean either (1) the public can use the expropriated land, or (2) the public can have the privilege of enjoying the expropriated land.[280] A statute authorizing road construction was held unconstitutional when the road was predominately for a private benefit, although the public had access to the road.[281] In another case, a company responsible for supplying water to a city could not divert water from the river, which supplied the city water, without compensating riparian landowners.[282] The substantial amount of diverted water impaired the downstream landowners who would have had the right to use that water.[283] This suggests that public access is not exempted from a defense against excessive trespass when a private beneficiary is operating a public work.

For greater clarity, the Alabama Supreme Court's advisory opinion affirmed that a primarily collateral and incidental public benefit fails the public use test.[284] Public utilities, which may be privatized, can benefit everyone in the community, not exclusive to corporate stakeholders or employees.[285] The private use is less vague with only specified universal utilities acquiring the power, and the Alabama Supreme Court advises strict preconditions when the legislature delegates the eminent domain powers to public utilities.[286] For example, a *common carrier* pipeline precludes an argument that the pipeline is for a private use, such as transporting natural gas between sister corporations.[287] Arizona, Virginia, and Wyoming permit privately operated utilities as a public use and simultaneously employ the traditional standard: actual possession, occupation, and enjoyment by a public agency or the general public.[288]

In summary, Alabama has later embraced the elastic, indefinite interpretation of public use despite its muddled history.[289] Alabama's liberal interpretation still leans towards a stricter, narrower public use standard and blight test in the national survey. Although Alabama is the top-ranked land-use state, its substantive law can improve from mirroring its sister states. Alabama could adopt more restrictive eminent domain reform laws, like Oregon's regulatory takings statute or Florida's ban on blight, or it could revive its traditional public use standard. Alabama could bind inverse condemnation claims with the State constitution's compensation clause, compensating for general damages and injuries to property.[290] The history of the Alabama and U.S. constitutions never foresaw how zoning laws would endanger property rights like the ancient eminent domain power.[291] The Alabama Supreme Court quoted New York Justice Bronson in explaining why the judiciary should strongly check the legislature:

> [I]f the legislature or the courts undertake to cure defects by forced and unnatural constructions, they inflict a wound upon the constitution which nothing can heal. One step taken by the legislature or the judiciary, in enlarging the powers of the government, opens the door for another, which will be sure to follow; and so the process goes on, until all respect for the fundamental law is lost … .[292]

We are at the juncture that Justice Bronson warned. The legislature molded zoning and created innovative regulations to bypass cumbersome eminent domain procedures as a compromise than a respect for property rights. This opens the door to property injuries and encumbrances without compensation or due process. Alabama compensating regulatory takings would respect the spirit and drafting limitation of its constitution to redress the law's evolution impinging property rights. Generally, if Alabama wishes to create a more liberal interpretation of its law, the courts should interpret its compensation clauses[293] as independent of the federal jurisprudence, making similarly worded provisions covering situations beyond the federal counterpart.[294]

State Compensation. The Alabama Eminent Domain Code compensates the property's fair market value without adjusting the property's value for the public work's degradation or improvement to the land.[295] Many legislatures detest eminent domain abuse and the wasting of the landowner's time. Connecticut, Michigan, Missouri, and Indiana define "just compensation" as an amount exceeding the property's fair market value to further these objectives.[296] Missouri pays the loss of familial heritage in addition to the 125% fair market value compensation award on the homestead.[297] Heritage value refers to properties owned and used within the same family for fifty or more years that can no longer be used after the condemnation.[298] The bonus payment to a compensation award can discourage the government from expropriating the neighboring properties, at lower market values, soon after the original condemnation.[299] In Connecticut, a government agency would need to pay an additional 5% of the fair market value to neighboring landowners between six to ten years after taking the first parcel.[300] The agency must expropriate all the necessary land within a few years or incur a delay penalty, which probably reflects the drop in market value for adjacent lands threatened with eminent domain.

Alabama offers additional condemnation benefits. Once the state or local governments no longer need the expropriated land, they cannot sell the land without first giving notice to the condemnee, or her heirs, of their right to buy back the land at the price of the condemnation award, minus taxes.[301] If the condemnee litigates the expropriation, the expropriator must pay the condemnee's litigation expenses if the condemnee succeeds in-part or in-full;[302] however, settling for a prescriptive easement, instead of negotiating for a smaller right-of-way condemnation, may bar the condemnee's cost recovery altogether.[303] The state agencies, but not local governments,[304] must pay relocation payments not exceeding $31,000 under the Eminent Domain Code[305] or relocation costs under the *Uniform Relocation Assistance and Real Property Acquisition Policies*

Act of 1970 if applicable.[306] Business owners cannot recover the destruction of their Alabamian business,[307] even though less economically free states obligate compensation for the lost goodwill[308] or the lost business use for the remaining property.[309] On occasions, Alabama courts adjusted the property's fair market value after considering the lost future business profits, but there's no guarantee.[310] A practitioner could convincingly argue the landowner should be compensated for the market value of lost business interest: leasehold, standing crops, and mineral rights.[311]

Stare decisis makes the cost of legal decision-making low and predictable; however, ignoring constitutional rights should not be accepted due to mere neglect or tolerance of the status quo in the State's jurisprudence.[312] Erroneous constitutional interpretations undermine the constitutions' intent to safeguard private property and make future corrections difficult and time-consuming.[313] The inconvenience in allowing the State residents to amend their constitution and allow certain private-to-private eminent domain transfer going forward far exceeds the risk of derogating constitutional rights as the legislature and judiciary cures the legal inconveniences of strict eminent domain laws.[314]

Conclusion. The U.S. has many great protections spread across many states rather than any one state. The strong deference to the legislature and inconsistent eminent domain expectations may undermine the good qualities inherent and circulated throughout the country. With a helpful background in U.S. eminent domain law, Chapters 3 through 5 will analyze the intricacies of eminent domain law in Singapore, New Zealand, and Switzerland. These chapters will analyze the constitutional and legislative authority surrounding each Studied Nation's eminent domain power. Furthermore, the compensation package in each nation is reviewed to determine if it eases the burden on the displaced landowners. A complete replacement property could be a superior remedy,

but land scarcity in smaller countries makes such a replacement impossible. If other nations aspire to replicate the top-ranking nations on property rights, the remedy should be feasible for other countries to emulate, regardless of geographic constraints.

CHAPTER 3 – SINGAPORE'S CONSTITUTIONAL PROTECTIONS & FUNDAMENTAL EMINENT DOMAIN PRINCIPLES

This chapter will review the constitutional and statutory protections concerning expropriations, known as *land acquisitions*, in Singapore. The available defenses for landowners and the compensation package for expropriations are consolidated and analyzed to show a landowner's expectations in the event of expropriation.

Property. The Singapore Constitution contains the most authoritative rights in the nation, following constitutional supremacy.[315] Singapore intentionally omitted a right to property in its constitution,[316] declaring the right onerous to the development of the resource-deficient city-state.[317] Singapore's founding father, Lee Kuan Yew,[318] argued that a constitutional amendment guaranteeing compensation for expropriations would flood the courts with countless cases questioning the adequacy of the compensation.[319] The first administration intended to expropriate much of the land to fulfill its vision of Singaporean economic success.[320] Dissimilar to the United States, Singapore has been less concerned about procedural protections from government corruption affecting property rights and more devoted to advancing their public policy objectives through expropriations.[321]

At the start of the twentieth century, U.S. scholar, Christopher Tiedeman, acknowledged that land scarcity accompanied by overpopulation would convert an unconstitutional private-to-private taking into a public necessity.[322] An acceptable private-to-private taking has caveats.

Tiedeman exempted farmland and industrial land that appears spacious and vacant because landowners expend capital and labor on the property throughout the year.[323] Meanwhile, Singapore has confiscated farmland opting for reliance on food imports with the intention of replacing farmland with vertical, urban farming.[324]

Due Process & the Right to Contract. The complementary right to contract also suffered a similar fate as the right to property.[325] Singapore has no clause precluding the government's impairment of contractual obligations, as found in the U.S.[326] The U.S. contracts clause rarely interferes with the government's eminent domain powers[327] and, yet, the constitution's prohibition on the impairment of contracts has safeguarded creditors – an economic minority – from being targets of expropriations.[328] A Singaporean contracts clause could have opened an alternative approach to question land acquisitions. Contracts are a property interest that is condemnable for a public use,[329] and expropriations distort sale-of-land contracts. No frustration of contract arises when the government issues a declaration to expropriation before the sale-of-land contract's completion date.[330] The buyer will receive useable land until the acquisition, a compensation award that will return the buyer's purchase price for the land, and possibly a new 99-year leasehold – the buyer could receive an *ex gratia* payment in this situation.[331] Parties default land sale contracts in contemplation of expropriation because either compensation gains outweigh the contract damages or losing the land encourages reneging on the contracts. A liquidated damages clause or a specific performance order should provide these victims with a remedy against the unjust enrichment caused by the foreseeable land acquisition and consequential contract breaches.[332]

Singapore Courts have not interpreted their constitutional due process clause as broadly as the U.S. The United States' constitutional due process clause expressly declares life, liberty, and *property* as protected under the fair procedures and impartial decision-making provision.[333] The

traditional meaning of "liberty" embodied fair procedures for the right to contract and the right to worship, although preceding clauses protected those interests.[334] Singapore's constitution states "No person shall be deprived of his life or personal liberty save in accordance with law."[335] Although property is not mentioned, the Singapore Courts will not interpret a right to contract as a *personal liberty* and have converted contract issues affecting property into non-constitutional property issues.[336] The Courts view the U.S. due process clauses as materially distinguishable because the Singapore Constitution grants Parliament almost absolute discretion to make laws affecting personal liberty.[337] Singapore's reluctance to accept the United States' expansive interpretation of *liberty* may derive from its fear of flooding the courts with questions about the constitutional scope of individual autonomy and other claims conferring the right of *personal liberty*.[338]

Singapore courts have the power to invalidate laws that violate constitutional norms,[339] but the constitution leaves property or contract rights unguarded. The Courts also cannot redress or alter pleadings about procedural inequities.[340] Once Parliament passes a law and the applicable agency complies with that law, depriving a person of her liberties may be constitutional.[341] The Courts publish a unified voice as they follow a strict philosophy respecting Singapore's democratic self-governance.[342] In stark contrast to the U.S. and New Zealand, the Courts have restrained the application of broad terms within existing rights that could potentially produce unenumerated rights favoring the political or intrinsic values of the judge or litigants.[343]

The Singaporean judiciary faithfully interprets the Singapore Constitution to deflect any conversion of the judiciary into a political institution.[344] The judiciary rarely looks to other international legal interpretations as persuasive evidence because Parliament can amend the constitution with two-thirds majority, which has not bottlenecked amendments over the past

decade.[345] The judiciary has persistently disallowed any inherent right to property, but it does find other constitutional rights within property interests. In *Eng Foong Ho*, the court found the state-ordered disposition of religious property could be unconstitutionally discriminatory if the government selected the expropriation site based on the owner's religion, race, place of birth, or descent.[346] The same reasoning may apply to overassessing one taxpayer compared to other similarly situated taxpayers.[347] Nonetheless, the judiciary nurtured a robust property and contract system accredited worldwide without the constitution guaranteeing those systems as the country's culture evolves or when the one-party-rule since 1959 ends.[348]

Equal Protection. Singapore's constitutional equal protection clause does defend citizens from unfair treatment or government action against their property interests based on religion, race, place of birth, or descent.[349] A legal practitioner would advise not to purchase land near public works as the Government's most important justification when expropriating is how the land adjacent to State land can benefit the development projects.[350] For a religious discrimination case, the plaintiff defending the religious land or historical site would need to show inequality in the government's decision-making or *prima facie* discriminatory legislation.[351] Picking one religious site instead of another religious site, errors of judgment, and inadvertences are not conclusive evidence of an equal protection violation.[352] Singaporean case law has confirmed that the absence of a constitutional property right denies landowners any separate compensatory remedy for a breach of natural justice or a breach of a statutory procedure.[353] In effect, the constitution's equal protection clause fails to defend landowners or repair their spiritual loss.

A landowner cannot claim a constitutional equal protection violation as a result of receiving a reduced compensation award compared to someone else unless the landowner can substantiate that the properties were alike when the expropriated land was assessed for compensation

purposes.[354] In the *en bloc* sale of a condominium, the Strata Title Board could constitutionally compel the sale of units in a Condominium when a minority of subsidiary proprietors rejected the sale.[355] Without a right to contract or property, a majority vote of the condominium owners can coerce the minority of subsidiary proprietors to dispose of their land.[356] The minority proprietors may recover for any financial losses incurred as a result of the *en bloc* sale.[357] Singapore also taxes landowners varyingly, punishing vacant landowners with a higher property tax to discourage the hoarding of unproductive land.[358] Unlike *Midkiff*, where the landowner was given the property through a change in sovereignty, property tax assessors can punish Singaporeans for accumulating land regardless of diligent savings, property management, or the deficit in local demand.[359] Only a few individuals owned Singaporean land at the country's founding, similar to Hawaii's statehood; however, Singapore punished future private land accumulation without considering how the land was acquired.[360]

The Land Acquisition Act. All the land ultimately belongs to Singapore.[361] Fee simple ownership is subject to exceptions and conditions expressed or implied in the land transfer or by law as amended at any time.[362] The government's decision to confiscate is not a justiciable question without showing the government's bad faith, fraud, or lack of authority.[363] The *Land Acquisition Act of 1966* (hereafter the "**LAA**") was promogulated to protect the landowners who already had a scarce amount of private land and to serve the public's interest with few restraints.[364] Singapore's State Advocate-General found land acquisition bills to conflict with a proposed constitutional guarantee of adequate compensation if the constitutional guarantees were adopted.[365] Even if Singapore ratified a constitutional property right, Parliament would have been advised to draft a constitutional exception for the land acquisition bills to dismiss complaints concerning the compensation amount, nullifying compensation's efficacy.[366]

Constitutional property law should restrain governmental power over something within its jurisdiction,[367] but the Singaporean Government can subdue most restrictions with a notice, called a *declaration*. Sections 5 of the LAA makes this notice of acquisition "conclusive evidence that the land is needed for the purpose written on the notice."[368] Private-to-private takings qualify as a public purpose if the Minister of Law finds the work beneficiary to the public or a public utility.[369] Known as an *ouster clause*, Parliament may *prima facie* prohibit judicial review of a regulatory agency's discretionary acquisition power.[370] The Courts usually do not question the merits of the Singaporean President's land acquisitions and the Ministry of National Development agencies' final land-use decision.[371]

According to the Singapore Court of Appeals, the agency's declaration commences the expropriation that "will lead almost with absolute certainty to divesting the owner of his title to the land and vesting it in the State."[372] The government alleges a public benefit, but the government does not need to consult the impacted community for recommendations or seek its participation.[373] A landowner can prove an expropriation is unlawful only if (1) the government misconstrued its statutory authority, (2) the LAA notice fails to meet a purpose specified in the LAA, or (3) the purpose declared on the notice is baseless due to bad faith or an ulterior objective.[374] Moreover, the Courts intervene when the competent agency exceeds its authority with unreasonable conditions on the landowner.[375] The landowner's arduous burden under this interpretation has led to outlandish results in Singapore and its former parent country: Malaysia:[376]

1. Merely acquiring thousands of acres of land beyond the original requirements for the project does not demonstrate bad faith or a secondary pretextual purpose for acquiring 4,000 more acres of land than was necessary.[377] The government can hoard land without penalty.

2. An adverse possessor who occupied a house on the property for decades was not entitled to any compensation for the lack of notice or breach of natural justice.[378] The government provided a small *ex gratia* payment to help the adverse possessor relocate.[379]
3. No bad faith was found despite the Collector of Land Revenue's failure to inspect the land under LAA. The land had a house, and the Collector failed to discover the house was subject to the land acquisition plan, which would have impacted the compensation award.[380]
4. Changing the public purpose does not evidence bad faith, even if there was no legitimate public purpose at the start of the proceeding.[381] The bad faith outcomes could be evidenced indirectly. A prolonged, unexplained period of inactivity (22 years) may establish sufficient evidence of bad faith or that the land was not *needed* for the stated public purpose. However, an *ex-post* investigation created no immediate action for the displaced landowners, even though the landowners must wait for the prolonged inactivity and absent explanation before raising a complaint of bad faith.[382]

Consequently, proprietors are at the mercy of the government to withdraw the acquisition, which is rare.[383] Given that the government can expropriate land "for any residential, commercial or industrial purposes[,]"[384] the Collector of Land Revenue acquires property with the intention of selling the property to a private developer.[385] "Even then, [the Judge] would have thought that there would still be an element of public purpose since such a sale would have been effected with [the expectation of] putting the entire surrounding physical environment to its best use."[386] Since one landowner could be more productive with the property, the private-to-private taking serves the best public purpose. The Court of Appeals has suggested that government agencies profiting from private-to-private acquisitions would face unfavorable judicial review while the private

beneficiary of the private-to-private acquisition is left unscathed.[387] The government has successfully leased the condemned property back to the original landowners or allowed private development under the guise of a future public work plan.[388] These judgments complement the LAA, which allows taking land for the need of a private person or corporation.[389] Unlike the United States' eminent domain reform, Singapore enforces urban renewal, redevelopment, and rejuvenation as the cornerstones of land acquisition given the country's small geography.[390] One landowner unsuccessfully attempted to develop the property and take measures to improve the land in order to avoid expropriation, but a landowner's curative measures cannot discontinue the government's grander development plans.[391]

Compensation. Since 2007, compensation amounts to the land's fair market value at the time of acquisition: the publication date of the public purpose or notification to conduct surveys or preliminary work.[392] Before 2007, government agencies were expropriating property at cheap, backdated prices spanning many years within a land-deficient country.[393] Land values appreciate in land-scarce growing economies, so the government's compulsory purchases at decade-old prices yielded a substantial discount for Singapore.[394] The government's sentiment shifted as it paid more for the acquired lands out of a moral obligation through ex-gratia payments, which are not legally guaranteed or enforceable precedent.[395] The government offered ex-gratia payments when more individuals suffer a financial hardship by the expropriation, when entities relinquish storefronts and fixtures,[396] when market value considerably exceeded the statutory compensation award, and when there was government error – computing compensation at $1 for declared nominal rezoning.[397]

In *Mustaq Ahmad*,[398] the government expropriated the land while a landowner was developing his property; the government had to compensate for the lost permission to develop the

land and the improvements that the government would benefit from after the expropriation.[399] In other cases, the government reduced the landowner's compensation award by the land's depreciation caused by the government's public purpose or zoning announcement,[400] even though the courts historically acknowledged that foreseeable, hard-to-appeal expropriations lower market prices.[401] The Court of Appeals reasoned that excluding the land's depreciation would increase litigation and thwart the government's budget when implementing land acquisitions, regardless of any detriment to the landowner.[402] Parliament is deemed responsible for rectifying the hardship, not the courts, yet deference to Parliament has produced no solution.[403] The Court of Appeals failed to consider how:

(1) the government could politically profit from the reduced condemnation awards at the landowner's detriment,

(2) the government had to spend more time computing and heralding the detrimental public purpose's effect on the property value to discount the compensation award, and

(3) Parliament did not expressly or impliedly penalize landowners for the acquisition notice undervaluing the property.[404]

Compensation awards have been regressed in other areas. Landowners have no compensation claim for the diminution of their property's value caused by land-use regulation.[405] The government may issue an ex-gratia payment if the harm from zoning creates public headlines or egregious inequity.[406] Verifiable lost earnings are unrecoverable, and a landowner preparing too early to relocate because of a future condemnation may fail to recover the relocation costs.[407] The early relocation expenses must be incidental in time, unpremeditated to the landowner's inevitable move due to the expropriation.[408] Any indication that the landowner would cease its business operations after the acquisition restricted the collection of removal expenses.[409] Singapore's

compensation philosophy prioritizes public purposes and public finances to prevail over private financial interests.[410] Therefore, optimizing public resources at the lowest cost will easily outweigh the landowner's interests, even when the landowner mitigates the expropriation's hardship through proactive measures.[411]

The Malaysian Connection. Singapore separated from Malaysia in 1965 due to "ethnic and political tensions" in Malaysia.[412] The Singapore Courts, which were formerly governed by the Federal Court of Malaysia,[413] find Malaysian case law to be "a helpful reference point"[414] or authoritative[415] given the similar legislation and legal systems between the two countries.[416] The Malaysian Constitution remains binding in Singaporean jurisprudence, as amended to conform with Singapore law, except for the Malaysian Constitution's right to property.[417] The Malaysian Constitution may furnish superficial protection, even if Singapore adopted the Malaysian Constitution's right to property via the Singaporean Constitution, Independence Act, or common law. The State owns almost all the land in Malaysia,[418] the public purpose statute matches the breadth of Singapore's LAA,[419] the State's compliance with Malaysia's *Land Acquisition Act* prohibits landowners from challenging the constitutionality of the State's procedure.[420] The expropriation becomes invalidated if commencing the expropriation process is dilatory.[421] Otherwise, many Malaysian cases reach identical conclusions to the Singapore courts.[422]

Final Remarks. Historically, the Singapore property regime has been construed against the landowner; however, in recent times, Singaporean land has been safe from expropriations due to the government's inactivity. From 2011 through 2020, Singapore's President has only issued 46 Public Purpose Declarations, with many Declarations recording only a couple of lot numbers.[423] The literature – the WEF Survey and economic freedom indices – may deduce that Singapore strongly enforced property rights because the government has been expropriating less land than at

the nation's founding.[424] By 1979, Singapore had expropriated a two-thirds of the country to develop public housing.[425] Presently, the Singapore government owns over 90% of the nation's surface rights with dwindling quantities of privately owned land.[426] The current property rights rankings are skewed. Singapore respects its leaseholds and contract law; however, it has exercised control over private ownership in earlier years without question. The American Bill of Rights is mostly absent in Singapore's jurisprudence, yet paradoxically, Singapore achieved great prosperity without enacting fundamental American rights and without adopting auxiliary wealth redistribution schemes alongside its centrally-planned property regime.[427] In practice, a country that preserves property and contract rights, without constitutional protections, provides serviceable property safeguards than a country with constitutional protections that fails to enforce that rule of law.[428] Singapore's culture may explain the discrepancy in landowner treatment. *Hofstede Insights* has measured the cultural and behavioral differences in countries worldwide for international business.[429] It found that Singaporean culture accepts a power hierarchy by putting society above the individual as a democratic value.[430] Americans have a greater tendency to focus on *winning* and looking after themselves.[431] With no expectation of a third-party support network,[432] expropriated Americans must consider how they can optimize their personal situation in the face of losing their house or business. Singapore values community and familial support during hardships with a focus on modesty and consensus instead of winning-comes-first.[433] Singaporeans could generally view expropriations as societal progress while Americans treat eminent domain as a personal threat without a secure safety net.

The LAA's objectives are (1) landowners could not profit from the expropriation, (2) the government could pay below fair market value for the mass acquisitions through statutory price freezing, and (3) the acquisition price should not account for high land values caused by the

government implementing the public purpose or neighboring public purposes.[434] This acquisition regime deviated drastically compared to other top-ranking nations. The government determines the compensation, which can be assessed below fair market value, and favor private developers with the limitation on what may qualify as compensatory damages to the landowner.[435] Almost anything the government declares as a "public purpose" is conclusive evidence of a public purpose.[436] The Singaporean regime satisfies the desires of Singapore's founding fathers: to have government urban renewal and rural development without equitable limitations for landowners.[437]

In conclusion, Singapore has an above-average system that protects property in an unconventional manner. Singapore has no express property rights, and its critics have reported the government biases affecting the administration of justice.[438] The courts refuse to question legislative or executive operations. The government has not resolved the absolutist discretion bestowed to government agencies, probably due to Singapore's political stability and consistency.[439] The Singaporean Prime Minister, Leader of the House, and ministers of the regulatory state have been members of the *People's Action Party* since Singapore's conception. If an opponent of the *People's Action Party* were to achieve majority votes, the opponent would deploy the broad legal mechanisms bestowed to the existing regulatory agencies to enforce its ideology.[440] Traditionally, a smaller country without local governance to restrict the nationalization of public policy could foster oppressive majoritarian views to become law.[441] It's easier to corrupt a city than a continent comprised of equally important small governments.[442] Future research will determine whether the *People's Action Party* will accept legalism once its opposition controls the obdurately overbroad discretion.[443] Likewise, the courts' resilient deference to Parliament and agencies may dissipate when new political leadership is reviewed for expropriation abuse.[444]

CHAPTER 4 – NEW ZEALAND'S CONSTITUTIONAL PROTECTIONS & FUNDAMENTAL EMINENT DOMAIN PRINCIPLES

This chapter will cover some of the authoritative legal instruments that landowners have used to protect their lands from expropriation. The *Public Works Act 1981* governs expropriations, known as *compulsory acquisitions*, and many other Acts cross-reference the Public Works Act when an expropriation fulfills the aims of the legislation.[445]

New Zealand does not have a conventional constitution that is the supreme law of the land,[446] but rather statutes in the *Bill of Rights Act 1990* ("**Bill of Rights**") that offer protections.[447] New Zealand is a unitary state – lacking states that significantly scatter power outside the capital city – without entrenched quasi-constitutional rights.[448] The New Zealand Parliament denied an express guarantee of property rights in the Bill of Rights on three occasions.[449] The omission also deprives those pursuing economic rights of any authoritative defenses.[450] The New Zealand courts have not acknowledged a right to property equivalent to the U.S. Constitution's Fifth Amendment.[451] If Parliament desired a constitutional right to property, New Zealand has the easiest constitution to amend, compared to the thirty-nine studied constitutional democracies, because Parliament can revoke any right and the entire Bill of Rights without limitation.[452] The Bill of Rights holds no higher authority than any other legislation,[453] and Section 4 forbids the judiciary from overturning another statute that conflicts or contravenes the Bill of Rights.[454] Instead, the court enforces its regular remedial responses to resolve the case and issues a declaration of inconsistency because the statute's conflict is unreasonable or no interpretation avoids the conflict.[455] The declaration vindicates the protected right breached by the other Parliamentary act.[456] The adaptable Bill of Rights reflects New Zealand's legal culture, which

recognizes the Constitution as partially unwritten and continuously evolving.[457] On the surface, it appears that modern federal legislatures worldwide are reluctant to adopt property rights regardless of their nations' histories.[458] Verily, the U.S. Congress has been in gridlock enacting federal property rights legislation on three occasions,[459] and the Federal Acquisition Policies are non-binding recommendations.[460]

Since all land is Crown land or Māori land until the Crown alienates fee simple estates, a private landowner cannot assert even a natural right in the land, indirectly questioning Parliament's public interest justification or the Māori Land Court's rejection of a change of ownership.[461] In the U.S., the government is supposed to protect the American people's inherent, natural right to property.[462] The legislature and Crown neither gifted nor derived the right to property; the American people and jurisprudence hold this right as existing before the U.S. Constitution's ratification.[463] The discrepancy between the U.S. and New Zealand in their interpretation of property rights makes the property rights rankings debatable.

Bill of Rights. Section 21 of the *New Zealand Bill of Rights Act 1990* bars unreasonable searches and seizures, but the courts observe this protection as an amalgamation of rights, not an exclusive property protection against searches and seizures.[464] A safeguard against property seizures is a criminal defense; however, it expressly omits compensation concerning land seizures, whether for prosecutions or expropriations.[465] The modern trend in New Zealand has been to expand the scope of the Bill of Rights generously; nevertheless, the court declined claims to read a right to property or compensation into the Bill of Rights.[466] Parliament's full and exclusive power to legislate makes Parliament immune from enacting "unconstitutional" laws.[467]

Inconsistent with the United States, New Zealand provides less authoritative protections to property and economic interests,[468] and the Bill of Rights never conferred absolute rights since it

restricts those enumerated rights to a reasonableness test.[469] For example, a government agent entering a property with prior notice[470] to inspect or conduct a proposed public work is not afforded stricter judicial scrutiny because complying with the prior notice requirement is considered reasonable,[471] although the government's power to inspect the property has no immediate statutory defense against loss, damage, or injury on the property.[472] Property may be taken by statute if Parliament considers the nonrecognition of the property necessary in the public interests.[473] Even the common law presumption against expropriation or the presumption against restrictions of property rights without consent or compensation does not prevail over Parliament's statutes.[474]

New Zealand once recognized the British landowner's power of veto and injunction remedy – to forbid certain actions on the property regardless of the amount of damage to the property.[475] In the *Goodson* case, the British Court of Appeals in Chancery proposed that Parliament should answer *whether the public interest* of installing water pipes *outweighed the private interests*.[476] However, the New Zealand Parliament has answered all possible questions about what qualifies as a public interest. The power-of-veto claim is powerless after New Zealand enacted multiple specific or overbroad public purposes throughout many Acts.[477] Consequently, the Courts cannot consider or revive a power of veto when Parliament has answered the question by making most acquisitions a statutory public purpose, whether by private companies or Crown agencies.[478] Generally, the Ministers of Land's power to acquire land does not apply to acquisitions solely benefiting private interests with no present or foreseeable public need or benefit.[479]

The courts also do not uplift the Bill of Rights Act to a quasi-constitutional authority, above Parliament's legislative power, when expanding its scope via the common law.[480] The strength of parliamentary supremacy has made New Zealand courts reluctant to declare statutes inconsistent since the ruling leaves the impermissible statute effective until Parliament decides to cure the

inconsistency.[481] The Attorney-General once appealed the court's ruling that the statute is conflicting, instead of reporting the inconsistency to Parliament.[482] The court's aversion to creating a common-law quasi-constitutional property right leaves the case law vacuous, unilaterally impacting economic and societal matters.[483] As a counterargument to the expansionist trend, Parliament drafted the Bill of Rights with precise words to inhibit purposivist interpretations.[484] Without an enumerated statement on "property," the Courts have no text to expand. The lack of property rights in New Zealand resonates with its British heritage. As Tom Allen, Professor of International Law, has written, "the British campaign for rights to property met with very little resistance from national leaders, and the impact of a right to property on a state's power to reform the economic system was often left unexamined."[485] This propensity does not mean New Zealand's ancestry held no property rights. British common law espoused a "presumption, in the interpretation of statutes, against an intention to interfere with vested property rights."[486]

One critic suggests that judicial discretion for determining property rights would make the legislature disinterested in drafting statutory rules regarding property rights.[487] However, New Zealand has frequently enacted and amended laws relating to expropriations and land-use. Parliament recently created an independent hearing panel for urban development, arbitrating the housing authority's development plans with the public concerns and the law.[488] Parliament established the New Zealand Land Valuation Tribunal and its relationship to the High Court.[489] Antithetical to the critic's suggestion, nominal judicial property rights have not dissuaded the New Zealand Parliament from ratifying a detailed public works regime with many levels of judicial oversight and compensation rules.

Magna Carta. New Zealand has a separate constitutional safeguard that indirectly prevents injustices in property matters. Chapter 29 of the Magna Carta states, "No freeman shall

be . . . disseised of his freehold or liberties, or free customs . . . but . . . by the law of the land."[490] The Magna Carta remains binding legislation under New Zealand's *Imperial Laws Application Act 1988* and its First Schedule.[491] However, the Magna Carta protections have merely validated the Public Works Act's existence as the statutes conferring the power to expropriate.[492] The Magna Carta has no separate property protection and has predominately been applied to criminal due process cases.[493] Thus, landowners cannot plead the Magna Carta as a direct defense against expropriation.[494] Instead, the legislature must promulgate the procedures to expropriate,[495] and Parliament, at its discretion, grants citizens a claim to compensation for land taken under a legislatively prescribed public purpose.[496] Courts have interpreted those prescribed statutes to ensure fair compensation,[497] which probably generated the widespread accolades on property rights.[498] The common law mandates a hearing when a government decision will affect property rights or a person's livelihood, which facilitates natural justice.[499]

The Magna Carta does not limit Parliament's legislative power because any property or compensation rights depend on Parliament's grace through enactments.[500] The Magna Carta is not New Zealand's first Public Works Act; it lacks any compensation parameters: such as "just compensation" or "full compensation" in other constitutions.[501] The courts and municipalities comply with the Magna Carta by following the rules under Parliament's Public Works Act because the Magna Carta only asks the government to comply with its statutes on expropriations.[502]

New Zealand's interpretation of the Magna Carta is not conclusive worldwide. When South Carolina lacked a right to compensation in its constitution,[503] Justice Richardson of the South Carolina Court of Appeals recognized the Magna Carta as having a sacred right to compensation.[504]

The lack of property rights in New Zealand. New Zealand may have precarious property rights similar to the majority worldwide trend, notwithstanding its accolades.[505] Parliament can abolish any property interest without justification, but at this time, the New Zealand Parliament is trustworthy enough to not radically overturn long-standing precedence. Justice McGechan summarizes the flimsiness of New Zealand property protections and the tyranny-of-the-majority threat:

> [P]rovided Parliament proceeds according to mandatory law governing the procedure for enacting legislation ("manner and form"), *Parliament is sovereign and can pass any legislation it sees fit. In particular, Parliament can enact laws expropriating property without compensation. In doing so, it can step right through existing laws and rights, obliterating remedies which otherwise would exist.* The Courts, providing Parliament proceeds according to law in the way described, cannot stop Parliament making such legislative changes. It cannot strike down such legislative changes once made (subject to the possible extreme reservation mentioned). There is no supreme law in New Zealand which inhibits those powers. In particular, Parliament can pass laws which are directly contrary to provisions of the [Bill of Rights]. . . . It is not for the unelected Courts to frustrate that legislative ability. *If content of legislation offends, the remedies are political and ultimately electoral. The fact those alternatives seem monumentally difficult, indeed unreal, to particular persons, or to those espousing unpopular causes, is no more than a dark side of democracy*.[506]

Justice Cooke reassured New Zealanders that "there are some principles of [New Zealand's] unwritten constitution that even Parliament could not override."[507] Unfortunately, this opinion merely created academic controversy than a common-law defense, deniable by parliamentary supremacy or statutes.[508] Parliament has the flexible power to make and repeal any laws at any time, and New Zealand's judiciary cannot invalidate legislation or conflicting statutes.[509] New Zealand has made expropriation without compensation[510] and abolishing certain property interests[511] unworthy of an unwritten protection in its common law, even when the community values the property being expropriated or abolished.[512] These findings befit New Zealand's constitutional culture of egalitarianism and absolutistic parliamentary supremacy, as

described by the Honorable Matthew Palmer and senior lecturer, Fiona Baker at Victoria University of Wellington.[513]

The Courts cannot impose an obligation on Parliament to legislate, but the Court's long-standing common law rules could inscribe a customary fundamental property right separate from Parliamentary acts.[514] The common law affords greater security from Parliament's politicization of fundamental rights.[515] Parliament can void these common law and customary rights by one statute abolishing the property interest.[516] However, a common-law norm proactively institutes constitutional propriety over good expropriation practices, creating cultural expectations independent from the evolving Bill of Rights.[517] At a minimum, other property rights can survive drastic legislative or common law changes when the practitioner can argue similarities between the common law principles and the custom or unwritten respect of property rights.[518] A custom inconsistent with the common law will not prevail.[519] The courts have "inherent jurisdiction to guard and promote the due administration of justice according to law[,]"[520] and at times, the judiciary should exercise this jurisdiction *against* the absolute deference to Parliament.

Analogous to Singapore, the New Zealand Government had a historically anti-landowner bias in remedying the harms of expropriations: "in no other kind of contract with the law does the average citizen feel the cards are stacked against him so much as when his land is required by either the Crown or a local authority."[521] Until the current Public Works Act's assent in 1981, commentators contended the expropriation framework failed in clarity, openness, fairness, and political responsibility.[522] Matters of national importance served as a catch-all term to free the state of notice requirements and community discourse.[523] Even today, some New Zealanders find "something foreign about the 'property rights ethos[.]'"[524] Arguments averring coastal land as having a social character in New Zealand – "community and egalitarianism" – cancelled private

coastal land developments.[525] Since New Zealand property rights depend on the voting public's mass approval,[526] property rights' sustainability remains suspect. With approximately 45% of New Zealand's surface area owned by private individuals, many landowners may appreciate more protective action to preserve their Crown-alienated land from resumption.[527]

Nationalization. The *Land Transfer Act of 1952* established secure and guaranteed title transfers after the Crown conveyed the property to private individuals.[528] The exception being how New Zealand nationalized natural resources and took those resources without paying compensation.[529] The landowner can recover injurious affection to her other property, legal and valuation fees, loss of income, loss of privacy, and costs related to monitoring the miner's compliance with any *access arrangement* between the proprietor and the miner.[530] Landowners intending to use the Crown-reserved resources on their land for their personal benefit must seek the Crown's approval with a permit.[531] The same approval process applies to landowners protecting their land from coastline erosion.[532] When the Crown does not protect the coastline, the landowner cannot act with self-help, and the Crown has no duty to pay compensation for the erosion damage to coastline homes.[533] New Zealand effectively revoked the gifted right to property and restored the "longstanding status quo[,]"[534] similar to how abolishing a property interest is acceptable if enshrined in a statute and politically profitable.[535] Large companies prefer nationalization because negotiating with a government entity is easier than negotiating with countless landowners parcel-by-parcel.[536]

New Zealand is not prone to impending expropriation risk with the absent legal safeguards.[537] When the Crown granted fee simple land to landowners, the Crown drafted covenants within the conveyance, subjecting the lands to specified Crown projects.[538] Parliament may draft legislation bypassing the Public Works Act's landowner entitlement and allowing the

Crown to undertake public works under a different Act without compensation.[539] A question remains whether the landowner received a discount on the land or some other advantage for entering the inferior land transfer.[540] Evading the Public Works Act would be politically unprofitable today. The same disapproval is found when a municipality honestly exercises authority under a different statute that did not grant a confiscatory power; the municipality is liable in tort for the *ultra vires* act.[541]

Compensation. The basic entitlement is full compensation for the expropriation or injurious affection.[542] *Full* compensation emphasizes the claimant's right to a complete equivalent position of what the government confiscated.[543] As Justice French adjudged, with full compensation, "[t]he claimant has the right to be put, so far as money can do it, in the same position as if their land had not been taken."[544] Compensation is assessed as the fair market value of the parcel or the expropriated portion of the land.[545] Inflation and the government's delay in paying compensation confers a right to simple interest at an interest rate that cures inflation and bears interest.[546] The landowner cannot collect interest on the compensation award when the landowner's objection caused the delayed payment.[547] New Zealand strives to achieve a principle of equivalence: "any compensation should place the owner in a position as near as possible to that which was enjoyed prior to the undertaking of the works in question."[548]

The landowner must apply to the Land Valuation Tribunal (hereinafter the "**Tribunal**") to determine compensation for compulsory acquisition unless the government and landowner execute an agreement settling the compensation amount.[549] Compensation is computed using the property's market value as if a willing buyer purchased the property and a willing seller sold the property on a date when the government vested its interest in the property.[550] The market value should account for both a premium to have multiple land-uses and lost profits from the abrogated

land uses, which is compensable as injurious affection.[551] Doubts in valuation must be construed in favor of the landowner.[552] The Courts dismiss sentimental value or improvements generating no return-on-asset.[553] The court might reclassify the time and money spent on the improvements as sentimental value regardless if the sentimental improvement increased the property value.[554]

Injurious Affection. Injurious affection is the depreciated land value of the landowner's retained remainder interest caused by a government action.[555] This is best shown with partial takings where the landowner's remainder loses value or is damaged from the adjacent public work. A loss of a potential land-use is injurious affection; meanwhile, the loss or replacement costs of the government's written consent to conduct activities on the land constitute a disturbance payment.[556] The government may claim a set-off against injurious affection if the government's public work concurrently increases the value of the remainder interest.[557]

Solatium Payment. Negotiation efforts are strongly encouraged given the government's obligation to "make every endeavor to negotiate in good faith with the owner" under the Public Works Act.[558] In 2017, Parliament further enticed landowners to settle with a $35,000 to $50,000 bonus to compensation if the landowners' primary residence is expropriated.[559] A compensation bonus of 10% of the land's value – not exceeding $25,000 – applies in circumstances where the land is not a primary residence.[560] For dwelling compensation awards that exceed the $35,000 base amount, $10,000 is an early signing bonus to encourage agreements about the compensation award that eludes litigation,[561] and the remaining $5,000 is a discretionary award determined by the applicable agency.[562] Entering an agreement with all the signing bonuses amounts to $50,000. The discretionary award has no published guidance;[563] thus, the landowner would need to plead their hardship during settlement negotiations to receive the bonus of $5,000.

Other forms of compensation. New Zealand compensates the landowner's moving costs,[564] expenditures for finding substitute land,[565] the diminution in value of the company's goodwill,[566] and replacement fixtures for the disabled landowners to access their new home.[567] Ancillary expenses to complete the expropriation, such as negotiation costs or fact-finding, are compensable as *disturbance payments*.[568] However, the Tribunal has rejected the sole-shareholder of a corporation from lifting the corporate veil and requesting disturbance compensation to the sole-shareholder.[569] An acquisition notice that prejudiced the property's sale, prejudiced investment opportunities paid with the land sale proceeds, delayed private redevelopment, and stopped searches for new tenants was not compensable or a disturbance.[570] The claimants may yield an award for the work stoppage and lost profits when the court record proves the government's failure to comply with its obligations caused the work stoppage.[571]

Buyback Procedure. When the government ceases to require the expropriated property for the specified public work or any subsequent public work, the appropriate authority must sell the land to the original landowner or her immediate descendants at the current market value or less if the authority considers it reasonable.[572] The successors may purchase the expropriated land even when the landowners relinquished its ownership due to situations independent of the Public Works Act: e.g., the government threatened a compulsory purchase if the original landowner did not execute the agreement to expropriate.[573]

Buyback Problems. The death of the landowner and the landowner's immediate descendants eliminates the buyback for all subsequent generations of that family, even if the government erroneously offered a buyback to a subsequent generation.[574] The family's short length of ownership before the expropriation may weaken the justification to execute the buyback procedure.[575] To make matters more convoluted, a family that incorporates their farm may lose

their right to a buyback because a corporation converts the familial interest in land into an economic interest.[576] The buyback opportunity is beneficial, but the displaced former landowner may not be able to repurchase the property at the current market value presuming land appreciates over time and the government installed commercial improvements or public work structures. Landowners may only repurchase their land during a declining housing market at more affordable prices. If land prices rise, the government could prejudice the former owner by delaying the buyback, making the market value impossible for repurchasing and ensuring the current titleholder – the government agency – receives a large capital gain.[577] The government receives reasonable time to offer the buyback.[578] Thus, delaying the buyback procedure for years is rarely a litigation claim, yet the government circumvents the buyback by delaying investigation of whether the public work is abandoned.[579] Nonetheless, the courts are reluctant to sever land that is not being used for the stated public purpose, over three decades after the expropriation, because the land has the *potential* to be used for the public purpose at some indefinite future time.[580] Moreover, the adjacent property owner may have a prioritized right-of-first-refusal against the buyback when the abutting landowner – who may not be the condemnee – could reasonably use the converted, expropriated land.[581]

Resource Consents (Zoning). New Zealand does not protect landowners suffering from a regulatory taking unless specific legislation authorizes compensation.[582] New Zealand refunds contributions paid towards suspended developments or land-uses when the local government cancels a permit[583] or waits for it to lapse to discontinue the private activity.[584] Landowners hold no defendable interest in their land-use.[585] The local authority has no duty of care to landowners when a permit is revoked unless the authority failed to comply with the statutory procedure for issuing the permit.[586] The landowner may negotiate work, services, or ways to mitigate the adverse

environmental effects that the private activity could cause to the landscape.[587] These negotiations equate to landowners "buying" themselves a resource consent[588] since the extra environmental protections generate "a net (social) benefit in any exercise of a resource consent."[589] Even if the landowner successfully acquires the resource consent, a trade competitor may object to the resource consent if they tailor the objection to aver anything except the threat of trade competition.[590] The consenting authority or courts should not factor the resource consent's effect on competition.[591] The landowner's only solution is to appeal the regulation or zoning plan to the Environment Court,[592] which generally does not award court costs on planning appeals.[593] The landowner would seek to modify, delete, or replace the existing or proposed zoning plan.[594] The landowner would plead either (1) the plan frustrates the reasonable use of the land, or (2) the plan imposes an unfair or unreasonable burden on any property interest holder: e.g., mineral rights affected, but not the surface rights.[595]

New Zealand does not compensate regulatory takings, which allows limitless restrictions on the property without compensation if property title remains with the landowner.[596] However, landowners can appeal the land-use restriction based on the legislation's scope permitting the encumbrance and whether a pretext or ulterior plan produced the restriction.[597] The government may escape the Public Work compensation requirement by imposing conditions on resource consents that induce an expropriation-like effect. In *Estate Homes Ltd*, a subdivision developer was required to construct an arterial road on the government's behalf, using the developer's property as a precondition for earning the permit to construct the subdivision.[598] The Supreme Court denied the developer's compensation claim because the developer did not need to build a subdivision, ignoring the landowner's intended purposes for investing in the land.[599] The government's delegation of public works to the zoning permitholder must have a logical

connection with the proposed development, although the public work is unnecessary for the permitholder: i.e., the subdivision did not need an arterial road.[600] This benchmark invites many public works to attach to private developments for the government's convenience.

New Zealand's zoning structure is unsympathetic compared to its former parent: The United Kingdom. The United Kingdom compensates land interests affected by the revocation, modification,[601] or discontinuance of the land-use permission and the imposition of conditions to retain the current land-use.[602] Suppose a development order is revoked and the landowner's development permission is revoked a second time or subject to more conditions; in that case, the landowner-developer may claim compensation if the U.K. Parliament did not exempt the right to compensation in a separate regulation.[603] The High Court said it best, "the statutory regime which governs planning law in the United Kingdom is very different from that which applies in this country."[604] For landowners, New Zealand's divergence from U.K. planning law leaves fewer legal defenses.[605] New Zealand could take legislative action to compete with the U.K.'s planning law while continuing its historical disclamation of regulatory takings,[606] analogous to how New Zealand's grander anti-property-rights sentiment has not disturbed its equitable expropriation laws. Case in point, U.K. restorative rights for modified or revoked permits has not instituted regulatory takings action; instead, the U.K. awards a damages remedy when landowners rely on the government's resource consent, regardless if the government errored in issuing the original resource consent or changed its policy.[607]

Conclusion. New Zealand is the baseline expropriation regime since most countries do not intend to raise property to a fundamental or absolutist right. New Zealand pays full compensation with bonuses to encourage settlements and to acknowledge the displaced landowner's hardship. In 2020, New Zealand reached more settlement agreements to expropriate than conventional *Notices*

of Intention to Take Land.[608] New Zealand's regime can accommodate countries aspiring to improve their economies without recognizing economic freedoms in the law. New Zealand has no intention of limiting Parliament's power, allowing the judiciary to invalidate conflicting statutes, or creating common law property rights beyond those already expressed in Parliament's legislation. New Zealand is less accepting of common law property protections than the U.K.[609] Expropriation issues are relative to the country's smaller size since the number of takings notices and cases matches the quantity found in the few U.S. states that prominently exercise eminent domain. Most expropriations arise in the major cities, which skews how widespread expropriations are for rural landowners.[610] Although these characteristics resemble an authoritarian country, New Zealand has little corruption and a strong judicial system.[611] In many respects, the New Zealand system has proven that an unfree, undemocratic country could retain its autocratic authority without sacrificing baseline property protections: non-discriminatory expropriations with indemnifying compensation for the victims.

CHAPTER 5 – SWITZERLAND'S CONSTITUTIONAL PROTECTIONS & FUNDAMENTAL EMINENT DOMAIN PRINCIPLES

This chapter will discuss Swiss laws relating to expropriation and regulatory takings. The federal constitution, expropriation act, and spatial planning act have fulsome remedies for landowners subject to expropriation-like government activities. The Switzerland advantage defends property from many perspectives: its institutional nature, the proportionality of the harms, its susceptibility to excessive regulations, and contribution to the economy and food supply.

Switzerland is the most unique country included in this study. It is the only Studied Nation with a civil law system;[612] hence, the Swiss Courts cannot declare Acts of the Federal Assembly

(legislative branch) or Federal Council (federal branch) as unconstitutional.[613] These traits are noteworthy since common law countries tend to have greater property and contract rights than civil code countries.[614] Without a common law system, all judicial decisions are non-binding on other courts unless that court's specific case ruling was overruled by the same court or a higher court.[615] Civil law countries favor parliamentary supremacy and skeptical of the judiciary correcting the legislature.[616] Nonetheless, the Federal Supreme Court ("Bundesgericht") contributed to the interpretation of the constitution, yet their opinions cannot serve as a formal constitutional law source.[617]

Switzerland's federal constitution embodies an *economic* constitutional law that finds a free, independent livelihood and economic system as fundamental to the nation.[618] Switzerland has the most meticulous constitutional defenses of the Studied Nations: (1) a right to property,[619] (2) a right to economic freedom,[620] (3) a principle of economic order forcing the federal and canton governments to respect and safeguard economic freedom,[621] and (4) other inferential constitutional rights protecting property.

Switzerland's subnational governments are known as cantons. The Swiss cantonal constitutions infrequently provide an additional cause of action supplementing the federal constitutional claims: i.e., practitioners only plead the federal constitution given its legal supremacy over cantonal law.[622] However, similar to the state constitutions within the United States, the cantons can furnish more rights than the Swiss federal constitution unless federal law has spoken.[623] The cantons nurtured the cultural admiration of property and economic freedom, while the federal government codified these principles.[624] The federal jurisprudence established an unwritten fundamental property right due to the cantons' constitutional guarantee.[625] Once the federal government acquired spatial planning ("zoning") powers under the 1960 Constitutional

revision, the federal government enacted a constitutional property right to ensure the cantonal, traditional guarantee of property withstands the new federal and cantonal zoning powers.[626] Zoning can have an expropriation-effect, known as *material expropriation* in Switzerland, which explains the future discussions about zoning relations to expropriation.

Right to Property. The Swiss constitutional right to property (1) protects the economic rights of the owner against restrictive State measures; (2) guarantees property as a fundamental institution, ensuring the protection of accumulated assets; (3) protects the owner from the harms of other landowners; and (4) guarantees compensation from compulsory takings.[627] The protection is not absolute; the municipality can zone property to prohibit certain activities or constrain the land use to a specified public interest.[628] Although the Constitution commits to a market economy, these higher protections do not deflate the Swiss welfare state.[629] Switzerland recognized property as a natural law because cantons guaranteed private property in their constitutions before the confederation and federal constitution arose.[630]

In other respects, Switzerland's intention to defend against the tyranny-of-the-majority failed.[631] The Supreme Court's rhetoric suggests that private property, as a fundamental right, is above the public interests except for the public interests given constitutional authority through a referendum.[632] Landowners rarely prevail in disputing the public interest, given the legislature's vast discretion in construing a public interest.[633] Commentators have proposed restricting the public interest to the constitutionally recognized public policies; this would eliminate spatial planning decrees that aim to intervene in economic competition and property.[634]

The Swiss institutional guarantee makes private property an object above regulations[635] that is immune from a new administration restructuring the country into a centrally-planned system.[636] Regulations cannot undermine property, impair someone's personhood, or be devoid of

saving, investing, or creating new assets.[637] The institutional guarantee demands the legislature to promote property's appreciation, creativity, and productivity by its private owners.[638]

The institutional guarantee preserves the legislature's sweeping discretion to regulate property developments,[639] subject to the landowner's right to demand compensation for regulatory takings and choose to sell the regulated property to a non-government entity.[640] Although the institutional guarantee has never reversed a cantonal property regulation, the U.S. may see different results with this unique defense since Switzerland found that the institutional guarantee is an indispensable prerequisite to preserving a predominately free-market economy.[641]

In Switzerland, an expropriation occurs when the State withdraws a person's property rights and transfers the property rights to an expropriator for a public interest, which may be a public or private work.[642] A material expropriation exists when the landowner is prohibited or seriously restricted from using the property.[643] The extent of the restriction remains unformulaic, but property losing more than 20% of its value constitutes a material expropriation.[644] Federal judges hold an unwritten power to define what qualifies as a serious restriction for each case.[645] If property development could show the future use likely would have existed except for the government's prohibition, then the Courts must consider the deprived future use of the property that is no longer possible.[646] If the regulation substantially affects one or a few person's property interests, then compensation is necessary for their unequal sacrifice for the community's benefit.[647] Secondarily, the court can deem a regulation to be an expropriation without a transfer of ownership and when the landowner's circumstances failed to persuade the court that a material expropriation occurred.[648] Article 5 of the Swiss Constitution demands government action to serve the public interest and to balance and consider all interests to achieve that public initiative.[649] The court deems an expropriation in circumstances where the landowner deserves compensation to preserve legal

equality, such as indemnifying a landowner who suffered an unreasonable harm.[650] In theory, compensation for regulatory takings is compensation for the government's breach of trust.[651] If the regulation is unlawful, then similar to the Studied Nations, the landowner is seeking damages for the illegal regulation or pseudo-taking.[652]

The property guarantee frustrates (1) the repeal of private property, (2) excessive property transfers to the State, (3) the severe impairment of using property or its essence as a legal concept, and (4) other individuals from encroaching on the property.[653] A landowner's property is her legal sphere, deserving of no state interference.[654] The Swiss legislature cannot abolish private property since property is held as "a fundamental element of the social and legal order[,]" according to prominent professor Enrico Riva.[655] As a Swiss institution, government systems must arrange themselves around property having legal force throughout society.[656] Cantons and the Swiss Code determine *what is property*, but, at a minimum, all property must be ownable, operable, and disposable by private individuals.[657]

Although the Right to Property raises procedural guarantees, the generic constitutional right to a judicial assessment of a legal dispute suffices, except the right to access a court is not always available if federal or cantonal law prohibits the hearing of certain subject-matter.[658] The Government must comply with Article 36 to not infringe on constitutional guarantees. The Article 36 infringement must (1) have a legal basis that satisfies legal equality, (2) be justified by a public interest, (3) protect other citizen's fundamental rights, or (4) be proportional to the harms caused by the expropriation to achieve that public interest.[659] Lastly, the core legal content or essence of the guarantee cannot be subordinate to the public interest because some regulations overstep the bounds of constitutional rights.[660]

Legal Basis & Public Interests. Constitutional public interest provisions include the protection of water resources, forests, and cultural heritage; these assets are bestowed equivalent authoritative power as the property guarantee.[661] Thus, landowners may not receive compensation when their property is encumbered as a precaution for those constitutional public interests unless the cumulative encumbrances practically expropriate the land.[662] Although untested at trial, a homeowner could argue the expropriation of her home intrudes on the constitutional public interest to encourage homeownership.[663] The Supreme Court examines the public interest and the source of that claimed interest for arbitrariness when the right to property has been encroached.[664] Similar to the traditional United States rules, a Swiss public interest favoring a private party must not be a pretext to transfer wealth to a different private individual.[665] State tax revenues are never considered a public interest justification.[666] A serious encroachment, such as difficulty putting the land into use, requires a clear and unambiguous legal basis from a statute.[667] For illustration, one farmer did not consent to hang-gliders flying over her property and was disallowed from building any structures on her property.[668] The Court found that the government could constitutionally restrict the farmer's construction to protect hang-gliders flying over the property, reasoning that the farmer's disrupted possession mandated compensation whenever a hang-glider landed on her farm.[669] An activity's popularity is a public interest consideration that could prohibit building permits.[670] In this case, someone potentially entering one's property for amusement purposes was an adequate public interest.[671]

Some public interests outweigh a public work. For example, any expropriation must protect historical sites and cultural monuments registered in the Federal Inventory that hold equal or greater national importance than the public work.[672] Nationally important interests are read harmoniously. Thus, one important interest may harm another important interest only if the

greatest possible protection to the harmed interest is observed; otherwise, the government must abandon the proposed public work.[673] Abandonment is the only option because if the public work could have been moved, the "greatest possible protection" standard would have mandated the public work's relocation to preserve both national interests.[674] The government has broad discretion to decide whether a property is worthy of national importance or expropriation,[675] discrediting the balancing act of conflicting public interests.

When the public interest justification for an expropriation disappears or the land-use plan is revised, the landowners can request a legal review of whether their properties should remain taken and how the plan should be revised.[676] The landowner may claim a lack of good faith government action under the constitution if the government violates the review requirements or abuses its discretion in reassessing the public-versus-private interests.[677]

For federal expropriations, private-to-private takings are permissible and normative if the third-party will serve the interests of the entire country or serves the public interests under federal law.[678] The Swiss have considered property as having a societal obligation to excuse encroachments that serve spatial planning or non-confiscatory tax objectives.[679] The government successfully confiscated a ski lift on a farmer's property for a future ski resort because the farmer refused to continue operating the ski lift.[680] In another case, the tenant successfully used the municipal council to expropriate their landlord's property to maintain a subleased golf course when the landlord refused to continue the lease.[681] Tourism is a strong public interest in Switzerland.[682] The transfer of the expropriation power to third-parties is not given stricter burdens of proof,[683] and other federal laws authorize private corporations – e.g., pipeline companies – to expropriate if there's a jurisdictional statute authorizing the private activity.[684] Four cantons expressly prohibit

private-to-private transfers by denying grants of cantonal expropriation powers to private persons; the cantons are Uri, Zug, Schaffhausen, and Aargau.[685]

Proportionality. Under the proportionality principle, (1) the encumbrance or expropriation must be necessary to achieve the public interest,[686] (2) the public interest must be sufficiently important to prevail over the landowner's interests,[687] (3) the government must not encumber the property more than necessary to achieve the public interest benefits, and (4) the limitation on property ownership must be reasonable.[688] The Expropriation Act provides a measurable, fact-dependent exception. The expropriator may acquire the entire parcel, instead of the part necessary for the public interest, when the value of the remainder depreciates more than one-third of its market value and the remainder is disproportionately difficult to use after erecting the public work.[689] The derogation of market value results from the landowner's inability to use land profitably.[690] Before expropriating private land, the municipality must use its available public land.[691] Otherwise, constitutional proportionality would be violated since the municipality procured additional land for no objective reason: i.e., they needed more land for the project.[692] Proportionality may not defend landowners when there are no other options. Even when landowners raised proportionality complaints, a court found that the lack of any other route to install a pipeline eliminated discussions about private interests.[693]

A public interest must present a stronger rationale when the private interests would suffer a substantial harm as a result of expropriation.[694] One canton violated equal protection and the proportionality principle when it allowed municipalities the right to purchase residential property for a compelling public interest when landowners requested a permit to demolish, modify, or change the land-use of a residential property.[695] Therefore, the civil code preempting the possibility of less intrusive means to accomplish a public interest would violate the proportionality

principle.[696] In a contrary example, the government attempted to expropriate agricultural land – a statutorily protected public interest that is less authoritative than the constitutional public interest of spatial planning.[697] The government would install a communal shooting range in compliance with federal law.[698] Two public interests – agricultural land and landscape protection – and the farmer's private interest conflicted with the public interest of constructing community shooting ranges.[699] The Supreme Court repealed the municipality's expropriation because it failed to consider these other statutory and private interests and failed to research other lands that could be converted into a shooting range.[700]

The landowner may receive compensation if the government gave the landowner binding assurances on how the landowner could use the land, and the government later reneged on those assurances by changing the land's zoning.[701] Nevertheless, modifications to the building code or zoning plan do not violate the good faith dealings requirement as landowners have no vested interest in land-use determinations.[702] Contrarily, zoning schemes outmaneuvering compensation requirements would contravene public policy.[703] A municipality cannot amend the property's zoning designation based solely on administrative efficiency.[704]

Federal & Cantonal Compensation Prerequisites. The federal constitution and some cantonal constitutions guarantee a right to full compensation with the objective of indemnifying the condemnee.[705] The government agency's jurisdiction and the legislation qualifying the expropriation can restrict the compensation's scope.[706] For example, a federal agency must comply with the federal procedures under the Spatial Planning Act.[707] If a cantonal government actor applies the federal procedures to the expropriation, instead of cantonal formal expropriation procedures, then the canton government cannot offer compensation beyond the federal standard, although their cantonal legislation and constitution express the contrary.[708] The compensation

award can exceed the federal standard only if (1) the canton conducted a formal, nonmaterial expropriation under its cantonal expropriation procedures, and (2) the surplus compensation is paid to all condemnees equally based on the injustice suffered.[709] All *material* expropriations must comply with federal procedures, meaning the landowner can recover full compensation without special surcharges.[710] This compensation discount may encourage cantons to deliberately design projects as material expropriations to abate the bonus compensation.[711]

Economic Freedom Principles. The Swiss Constitution has a *Right to Economic Freedom* and a *Principles of The Economic System*.[712] Economic Freedom is the unconstrained pursuit of private economic activity to make a living.[713] The Constitution also guarantees Switzerland as a market economy[714] under certain exceptions. The exceptions entail cantons monopolizing an industry or setting price-controls within their jurisdiction[715] and allowing private monopolies to efficiently and inexpensively appease the general population's needs or health.[716] The Federal Assembly retains the sole authority to enact restrictions of constitutional rights.[717] The public's benefit from these exceptions must (1) overpower the adversely-impacted private interests,[718] (2) outweigh the constitution's preference for competition, and (3) have a legal rationale before ratification, such as protecting public order.[719] Shielding an industry from competition curtails the constitution's free-trade principle, making the regulation – the shield – unconstitutional.[720] A canton cannot force a business to purchase certain inputs or services for the community's benefit without violating constitutional economic freedom.[721] Economic freedom liberated the trade barriers between the cantons,[722] which explains why only the federal government can enact laws that derogate economic freedoms.[723] Unfortunately, Economic Freedom is considered a lesser fundamental right than other Swiss liberties.

Constitutional Economic Freedom (1) protects persons from restrictive state measures to produce and trade, (2) ensures the government keeps the business environment favorable to the private sector, and (3) prevents conflicting cantonal markets in Switzerland.[724] The economic principle, in part, forces the federal and cantonal governments to preserve economic freedom.[725] Nationalizing an industry will not allow the government to bypass economic freedom requirements or sue a private-sector competitor under an economic freedom violation.[726]

Economic Freedom's relation to Property Rights. The combination of a right to property and economic freedom fosters an ancillary constitutional freedom to contract, which is necessary for economic activity.[727] Albeit rare, the freedom to contract stops governments from controlling alienation or forcing the property into a specified use.[728] For instance, freezing the price of land and forcing a lease of vacant housing units were violations that impaired the landowner's disposition of her property and freedom to contract.[729]

The government can infringe on economic freedom on similar grounds as the right to property: protecting the environment and heritage, assuming the property is maintainable.[730] Traditionally, courts scrutinized public interests; however, many commercial police powers and socio-political reasons excuse economic freedom encumbrances, except for state-controlled economic activity.[731] Constitutional liberties outweigh any ensuing job losses and reduced business productivity from the state-controlled activity requiring trade protectionism.[732] Nevertheless, a pretext to create an economic policy through zoning regulations would violate economic freedom and be overturned.[733]

To limit the Constitutional protections, Article 36 of the Swiss Constitution provides a four-part test to restrict a fundamental right. The Test limits restrictions on the rights of property

and economic freedom.[734] To comply with Article 36, the economic freedom or right to property restriction:

(1) must have been put into law by a municipality or legislature[735] to serve a public interest or protect a third-party's constitutional rights;[736]

(2) must be suitable, reasonable, and necessary to achieve the expressed public interest;[737]

(3) must not abrogate the core or essence of private property or economic freedom;[738] and

(4) must not originate from economic policy that deliberately intervenes with the free market or favors specific industries or companies, thereby violating legal equality.[739]

The statutory exception must be suitable and necessary to achieve the legislative objective, and the repression of economic freedom is necessary to reach that objective.[740] Since Switzerland lacks ordinary judicial review powers, the Swiss courts share analogous judicial powers as New Zealand courts: the judge may only recommend that the Federal Assembly amend the conflicting federal law or scrutinize the law until it can be applied harmoniously with the constitution.[741]

Similar to American states, the cantons can set higher requirements than Article 36 on permissible cantonal actions restricting the right to property.[742] One commentator has found that the Article 36 protection is a parchment right since a popular referendum – which the Federal Assembly fails to question and succumbs to political pressure – would be difficult to overturn on the indefinite "reasonableness" and "public interests" test under Article 36.[743] Compared to the U.S., which only questions the taking's public use, the judicial considerations of the right's core, essence, and proportionality with the government's objectives offer more for landowners to dispute.

How property is affected may change the remedy for infringements of economic freedom. Quotas on meat and egg production were considered an economic management question, not a

material expropriation of the farmer's chattel usage; thus, compensation was not a potential remedy.[744] Under a property impairment theory, compensation for the lost production is possible, especially if one or a few farmers were affected.[745] The farmer can further rebut the issue if she proves that the property regime's change was severe and abrupt.[746] On non-residential property, economic freedom could raise a claim that expropriations interfere with the citizenry's pursuit of private economic activity or are anti-competitive when the private beneficiary is related to the landowner's business competitor.[747] A sole-proprietor's free choice to locate her business wherever is a guaranteed constitutional right notwithstanding preexisting zoning regulations.[748]

Economic Freedom & Zoning. The constitutional guarantee of economic freedom can save the landowner from unconstitutional zoning laws that intervene in economic competition:[749] e.g., a canton should not promote certain industries through zoning.[750] Judges can evaluate land-use regulations with an economic-impairing effect to analyze whether the regulation's necessity outweighs the economic impact.[751] Commercial-political policy disguised as spatial planning obstructs the development of a meaningful land-use regime and are not tolerated.[752] Although rejecting activities in particular zones restrict commerce, they are upheld as constitutional since a spatial plan must designate properties into different zones, and the plan cannot block all market competition.[753] The Supreme Court has issued conflicting opinions on this matter. A city's denial of building demolishment, which favored the local industry, was affirmed as constitutional.[754] Cultural policy can reject competitors from purchasing property to engage in certain industries.[755] The government can reduce the zoning size for that industry, conclude an objective reason why fewer customers would be found in the planned location, or allege that the competitor does not target the same customers as the local competitor because it charges higher or lower prices than the locals.[756] These government options circumvent breaches of economic freedom: a freedom

intended to stop State encumbrances against business activity on property.[757] Therefore, zoning regulations must consider the intentional or unintentional economic side effects to uphold the right to economic freedom.[758] The right does not compensate the victim for the wrongdoing committed, but a separate statute may reimburse the victim for the corresponding losses derived from the economic freedom violation.[759]

Nationalization. For expropriation purposes, Switzerland struggles at any attempt to nationalize commercial enterprises – unlike New Zealand – because their constitutional right to economic freedom and the right to a market-based economy prioritize the private arrangements.[760] Switzerland found no historical, compelling rationale to nationalize private activities.[761] Thus, economic freedom may aid the landowner's challenge of the expropriation's necessity and proportionality when the expropriation jeopardizes the landowner's profession or contractual interests.[762]

Equal Treatment Under the Law. A Swiss landowner may also plead discrimination or unequal treatment.[763] To prevail, the landowner would need to prove that the court found legal distinctions when the important, distinguishable facts did not arise to opine a different outcome, or the legal distinctions that could alter the judgment were omitted from the legal reasoning.[764] The Swiss have federal and cantonal constitutional rights to an independent and impartial tribunal during a proceeding,[765] and an unlawful exercise of federal judiciary power may result in the federal government paying proprietary damages from the unlawful decision.[766] Without many challenges to judicial immunity, a judge would probably be removed for obvious or repeated discriminations in expropriation decisions.[767]

If landowners are treated differently under the same circumstances, then compensation can redress the unequal treatment.[768] If the landowner sacrifices more than other victims in the

community, then compensation should account for the asymmetrical burden to the landowner, which benefitted the community,[769] or the statute's unintended consequences that create gross inequality.[770] For zoning purposes, the equal protection article has a negligible effect in defending landowners since dividing properties into zones is fundamentally discriminatory against similar neighboring properties,[771] and the similar parcels can be treated differently based on their possible future use.[772] Equal protection scrutiny emerges when the municipality divides the jurisdiction into zones, the municipality freezes the expansion of certain zones (e.g., to halt building permits), and the municipality renders a justification for the asymmetrical treatment or expansion between the zones.[773] The Federal Constitution's Equal Treatment clause only applies to governments; thus, the private entity exercising expropriation powers likely cannot violate the equal treatment clause when expropriating.[774] Concomitantly, the federal agency approving and overseeing the private entity's expropriation would be held accountable for equal protection violations.[775] The equal protection clause will apply in expropriation cases, but whether the third-party expropriator, serving as the State's actor, can directly violate the equal treatment clause appears to be unanswered.[776] Generally, any administrative action prohibits arbitrariness and unequal treatment and mandates good faith dealings with the expropriated persons.[777] Waiving these requirements would unlawfully restrict fundamental rights, breaching Article 36 of the Federal Constitution.[778]

Zoning Taxes. The federal government demanded the Cantons to tax the landowner for any appreciation in the land derived from the rezoning plan.[779] The tax eliminates the capital gain windfall when the property is sold as a building zone with less construction and land-use restrictions.[780] The tax increases the property's cost basis it is paid to develop the property under a permit, or the tax is paid when the parcel is later sold, deducting the payable capital gains taxes on the land sale.[781] The objective is to equalize landowners when one landowner benefited from a

particularized governmental act or to have the landowner pay for the government's special benefit to that parcel.[782] Landowners should neither suffer a loss nor gain a profit from the government's zoning plan.[783] Detrimentally, the landowner may have no participation or prior knowledge of the rezoning or changes in land-use, but the landowner can expect at least a 20% value-added tax on the land's appreciation from the beneficial rezoning[784] and cantons might contrive advantageous value with permits or land settings to tax the landowners more with unanticipated governmental benefits.[785] Cantonal attempts to exempt persons from paying the value-added tax have contravened federal law, making corrective government action potentially taxable.[786] Currently, the Cantons can waive the tax if tax collection is unprofitable.[787]

Here, the landowner takes the new cantonal permits, land settings, or zoning benefits that it may never have petitioned: an involuntary benefit.[788] The landowner will incur greater property taxes for the ongoing advantage, which increases the property's taxable value. The government benefits from the value-added tax and the adjusted tax revenues from the rezoning.[789]

Compensation for Expropriations. Switzerland offers immense coverage for expropriations and excessive regulatory takings. It can be summarized as full compensation for the confiscated property,[790] plus special damages and other quantum of damages to other property, plus a surcharge for the involuntary expropriation on condition that every condemnee is treated equally by the amount of and qualifications for the surcharge.[791] Full compensation arrives in cash computed as the market value minus encumbrances,[792] recurring services, or like-kind transactions – particularly for lost agricultural businesses.[793] Landowners can demand compensation for lost future business income,[794] lost special zoning benefits, relocation costs, and architect costs for adapting the new premises for the condemnee.[795] Expropriating special property, such as farmland, may require an in-kind benefit based on the replacement's availability and if the judge deems it

appropriate.[796] The Federal Supreme Court reduced the landowner's burden of proof for difficult-to-prove harms and construed evidentiary ambiguities in the condemnee's favor: e.g., when physical damage can neither be proven nor revoked.[797]

Buyback Procedure. In the Expropriation Act, the landowner has one year to demand the condemned property be returned to her if the property has not been put into service within the government's deadline (approximately five years plus extensions), the surplus property has not added-on to a public work within 25 years, or the property has been discharged of its public interest.[798] Therefore, the expropriator can abandon the property and wait about 25 years to implement the plan to expand the public work with the new land.[799] No work plan is necessary, and any prepared plans are non-binding.[800] If the government changes the public interest, the landowner can demand reacquiring the condemned property one-year after the landowner knows that the expropriator conveyed the property to a third-party or the property's public interest has been relocated or changed.[801] The expropriator must notify the landowner, at her address,[802] of the abandoned or changed public interest; the expropriator's failure to provide notice and an opportunity for the condemnees to repurchase their property results in a compensation award to the condemnees when the land is sold to someone else.[803] The notice is required for replacing public interests because the expropriator lacks authority to decide whether the new public interest takes precedence over the landowner's right to recovery.[804] Additionally, the landowner may not receive adequate notice of the revised public interest justification without the notice. Case in point, the Supreme Court once treated the expropriator's transfer to a third-party without a right to recovery as a new expropriation.[805] The expropriator will compensate the landowner with the money it received from the sale in contravention of the notice requirement, excluding cost-of-living adjustments.[806]

Moreover, the expropriator must restore the property to its original condition before the expropriation unless the costs to restore the property would be monumental.[807] When the property cannot be reasonably restored, the landowner may retain a fraction of the compensation award since the landowner holds the right to deduct the unrestored or inferior value of the property she is buying back.[808] Any added value to the land may require the landowner to pay the expropriator more than the compensation award.[809] Generally, the landowner returns the compensation received, excluding interest and a present adjustment for inflation, to repurchase her land.[810] The landowner should ensure that any signed agreement with the expropriator does not relinquish the landowner's right to recovery if the property has not been used for the intended purpose or not put into use.[811]

Compensation & Zoning. When a parcel is not within a building zone, the parcel is known as *non-zoning* regardless of its highest and best use.[812] Non-zoning regulations are not compensable generally,[813] and a landowner is not entitled to reassign her land for development, irrespective of its future potential.[814] The Federal Supreme Court has found an expropriation-like effect on non-zoning land when the property is located in or near an urbanized built-up area, and a substantial investment in developing the lot has commenced.[815]

To improve the landowners' chances in litigation, the Supreme Court has recognized that, in special instances, the property should have been zoned, requiring a compensation award.[816] In *Billeter and Mitb*, the Supreme Court ordered compensation to landowners of commercial, developed properties deemed *non-zoning*, contrary to the general rule.[817] For decades, the properties were subject to the General Sewer Project and had lawfully acquired utility lines for the residential and commercial buildings; these were developed lands satisfying the statutory definition of a building zone, although lower court ruling and municipal classification concluded

that the lands were non-zoning.[818] The court's consideration of the surrounding circumstances protects landowners from the Cantons' nonrecognition of compensation since non-zoning lands do not presumptively experience expropriation-like land-use restrictions.[819]

A practitioner would advocate that the non-zoned property qualifies as building zone property because (1) the lands can be or are connected to a sewer system,[820] (2) the lands comply with the laws that protect water resources,[821] and (3) the landowner has incurred considerable expenditures to develop the lands.[822]

Compensation is required when a zoning plan revokes an existing right of ownership, when a potential use that would probably occur in the future was abolished, and when an exceptional hardship arose.[823] Compensation computes the difference between the parcel's value with and without the existing or expected usage rights.[824] Property restrictions that neither disrupts the land's current use, nor relinquishes ownership, nor imposes a special sacrifice of one landowner for the benefit of the community are known as *public property restrictions*.[825] Minor land-use planning restrictions – e.g., groundwater protection and building code servicing health and safety – qualify as public property restrictions and are not compensable to the landowners.[826]

Special Protections for Agriculture. Before commencing a project, the government must attempt to remedy the harm caused to protected priority interests such as forestry, natural beauty, and agricultural land.[827] The municipalities can designate two zoning areas to agricultural land that contains no buildings, which enhances its protected status: Agricultural Zone and Protection Zone.[828] One federal ordinance issues another test discouraging municipalities from redeveloping lands capable of crop rotation: Can the public interest reasonably be achieved without the land capable of crop rotations? Is the claimed area being used optimally? Is there a minimum share of crop rotation lands in the community?[829] The Federal Assembly bestowed special privileges to

farmland because a long-term, secure food base is vital to the country's sustainability.[830] If Switzerland's food supply shorted, the country could make nutritional plans depending on the designated crop rotation areas.[831]

The **Elasticity of Property Theory**[832] contends that the Swiss constitutional right to property declares all land with inherent, natural rights that are restrained under regulations. When the government releases a property from regulations, the property does not create a new use rather it revives the landowner's natural rights to the property.[833] The right to property embeds a freedom to build on the property,[834] and repealing a regulation returns the property to its original value with no windfall gain.[835] Nonetheless, the landowner is taxed on the property's restored unhampered condition.[836] The counterargument states the tax assesses the landowner's repossession of its inherent property rights, which offsets the inequality of neighboring landowners who have not repossessed their property rights from the regulation.[837] The value-added tax would be substantially lower if the tax only recovered the structural planning costs or administrative costs.[838] No one would dispute that beneficiaries of public expenditure should pay to maintain the special benefits; however, planning measures that merely reclassify land-use opportunities are not burdening the general public or causing consequential damages to neighboring lands.[839] The government may argue that the value-added tax funds the compensation paid to landowners for other expropriations or irreparable damages from modified land-uses,[840] but the argument fallaciously assumes that the expropriation is not a burden borne by the *whole* public.[841] Instead, the value-added tax singles-out individuals to fund a future expropriation regardless of whether those taxpayers are identifiable beneficiaries of the future expropriation and not the general public.[842]

The Supreme Court did not dispute the Theory's veracity, but it declined to recognize the claim based on practicality.[843] Unless there's a grave inequality or a foreseeable construction ban, a landowner cannot seek general compensation when her property is redefined, limiting the available land uses.[844] Zurich's Administrative Court expansively rejected the Theory on the grounds that property is not a preexisting natural right, and it must comply with the legal order and the constitutional spatial planning policy.[845] This reasoning conflicts with the *property is an institution* constitutional principle, and it suggests that property rights are subservient to any new political order, even one that does not uphold private property.[846] Besides violating the federal property standard, the government regulation could substantially encumber property or destroy its prior customary use forever, creating a material expropriation.

Conclusion. Switzerland has far more authoritative defenses for landowners than any of the Studied Nations, and its judiciary persistently enforces them. The defenses cover the legal concept of property, competition, economic freedom, excessive zoning, nationalization of resources, equal protection, and good faith, non-arbitrary state action. Property has held a greater cultural and historical significance in Switzerland than in most European countries.[847] Switzerland is a civil code country that offers greater property and contract protections than many common law countries, which is an outstanding accomplishment.[848] Albeit imperfect, Switzerland has made continuous progressive efforts to defend landowners. In 2020, the Federal Assembly increased the compensation amount for agricultural land by three times the maximum value of comparable farmland.[849] The Federal Assembly removed any conflicts of interests between the expropriators and the appraisal commissions by having the federal government pay the appraisal commission's compensation, in lieu of the expropriators through fees.[850] Unlike the U.S. and the Studied Nations, Switzerland successfully enacted binding *federal* legislation improving property rights.

CHAPTER 6 – DISCUSSION

This section will analyze and incorporate the abovementioned data from Chapters 2 through 5 to make general observations and answer the lessons learned from the Studied Nations. The research aimed to discover how the United States could improve its eminent domain regime by combining the best attributes or laws from each Studied Nation. The specific characteristics of these countries' expropriation laws to be discussed here are:

Constitutional Supremacy versus Parliamentary Supremacy. Switzerland, Singapore, and New Zealand have one or more of the following: parliamentary supremacy, weak judicial review, no direct votes for the executive branch, the legislature can easily amend the constitution, or restrict who qualifies for the executive branch leadership.[851] This section will examine how these features may pose a threat to preserving property rights or any minority interests. The constitution behaves as the contract between the government limiting its power and the people securing certain rights and being a superior political authority to the government via its constitution, as amended.[852] Constitutional supremacy aims to block most majoritarian hostility or repeal efforts at any time;[853] therefore, a legal system enshrining the constitution should make the constitution a burdensome process to amend. An easily amendable constitution allows Parliament to repeal a provision directly, instead of by statute under parliamentary supremacy. Constitutional supremacy has no standard amendment procedure; nonetheless, the amendment procedure should require the federal government and the people, or the subnational legislatures, to have a supermajority vote on amendments with no opportunity for a total revision to better preserve the constitution.[854] As an illustration, all substate constitutions in federations are easier to amend than the federal constitution.[855] Most U.S. state constitutions only require a unicameral legislative

supermajority (over half, three-fifths, or Delaware's three-fourths majority vote) with no separate vote to approve the amendment – a public referendum or the county councils' votes.[856] Without multiple groups voting on the amendment, akin to a proposed U.S. federal amendment, it is unsurprising that under 40% of U.S. states preserved their original constitution, and all but three states have substantially increased the number of amendments over time.[857] When a constitution is easy to amend, the constitution is a statute without constitutional constraints,[858] which supports Thomas Jefferson's contention to have a living, evolving constitution for the states and not the federal government.[859] Otherwise, people and foreign investors would question the sustainability of the minimum constitutional guarantees.

A difficult-to-amend constitution, which is the supreme law of the land, may lead to judicial supremacy where an official other than the legislature interprets and publishes the final word about whether governmental acts are unconstitutional.[860] A nation has some variation of judicial supremacy when an official, like a judge, can overturn parliamentary acts *and* contributes to the unwritten constitution through the common law with the official's temperaments overleaping the constitution or legislation.[861] A constitution is customarily antimajoritarian; thus, the constitution or legal culture assigning unelected judges as the guardians of the document is intentionally the most undemocratic means to preserve that spirit.[862] Under parliamentary supremacy, the constitution and the judiciary cannot conflict with or impede other parliamentary acts since it bears no higher authority above other laws.[863] Parliament could ignore the right to property because the right holds no greater authoritativeness than the other legislation. Parliament is always correct and can never bind itself to prohibit future legislation, making constitutional constraints powerless.[864] If James Madison's and Alexis de Tocqueville's warnings about the tyranny-of-the-majority are correct (see *infra*), constitutional property rights urge a country to

adopt constitutional supremacy with judicial authority to overturn parliamentary acts that are forbidden per the constitution.[865] This authority is distinct from judicial supremacy because the judge merely exercises judicial review, applying the plain meaning of the constitution as preempting all other, conflicting legislation.[866] Otherwise, with parliamentary supremacy, one administration could repeal the right to property by statute or through a unilateral amendment. The United States' anomalous separation of powers entrenches the federal constitution against political pressure or evolving popular opinions.[867]

Judicial review or supremacy is not an irrefutable defense against government manipulation. A judiciary can openly accept legislation that degrades property rights because of political ideology, entryism, bribes,[868] and honest mistakes of law or injecting words into the constitution.[869] Singapore and the United States offer constitutional supremacy where the courts can find legislative and executive acts unconstitutional, but both countries have complementary corrections for each other's respective issues. Singapore's court system is more consistent and less political, while the U.S. Supreme Court has become politicized.[870] Singapore courts practice more judicial restraint and originalism yet are open to international legal interpretations as persuasive evidence.[871] The Judges do not legislate from the bench or seek to optimize rights between compelling policy interests; however, they do not defer to Parliament to correct or answer legal problems.[872] The Singapore Courts may be disinclined to invalid statutes since Parliament amended the Constitution to restrict the "courts' supervisory jurisdiction" on a subject in response to the Court of Appeals overturning legislation about that subject.[873] Contrary to the United States,[874] Singapore's Parliament can unilaterally amend most parts of the constitution with a two-thirds majority vote.[875] Thus, Parliament can amend the constitutional conflict before enacting their new legislation if they acquire a two-thirds majority parliamentary vote. If the U.S. could

make the judiciary more Singaporean, uniform with textualism and less political entrenchment, constitutional property rights would have a better resilience against degrading legislative acts. U.S. judges exercise their judicial powers without hesitation of Congress revoking them; thus, the problem is inconsistency among the judges with enforcing the constitution as-written. The current U.S. strategy of tossing statutes at the courts to see what is acceptable for the current justices establishes a custom of chiseling at the foundation of property rights with new ideas unfounded in the written instrument.[876] Madison held concerns about the constant attack of constitutional rights through amendments or appeals, making the economic costs of decision-making uncertain when developing or purchasing property for the long-term.[877] Therefore, a constitutional property right is not the all-inclusive defense against arbitrary eminent domain.[878] Nonetheless, a constitutional right to property remains imperative in a constitutional or parliamentary supremacy jurisdiction. New Zealand and Singapore judges have not enforced common law property rights to rectify the hardships caused by the legislature's inertia at legislating strong property rights when no constitutional right to property exists. A nation's success at upholding the right predicts the right's power, resilience, and innovation[879] throughout a nation's history.

A return to textualist, traditional interpretations of U.S. eminent domain law would revive or add new property protections. An international interpretation is the Swiss Elasticity of Property Theory. First, the United States does not tax rezoning because there was no realized income from the governmental activity to the landowner. This trashes the practicality complaint that repelled the Swiss Supreme Court from affirming the Theory officially. Second, the U.S. accepts property as an inherent natural right, meaning the request to perform certain activities on the property is a restoration of the property's unencumbered nature from zoning laws. Minimizing bureaucracy and paperwork to use the land as intended dignifies the foundational legal principle that property is an

inherent right and facilitates a preference towards productive private activity, even personal use, unless there is a countervailing government interest: e.g., abating a nuisance or trespass.[880]

The Property Guarantee. Property guarantees in the federal and subnational constitutions safeguard distinct procedures depending on the government actor: a state taking compared to a federal agency taking. Two guarantees (federal and subnational) increase the number of distinct defenses to investigate the infringement, especially when the state provision is more expansive[881] and interpreted differently than the federal constitution.[882] Ideally, The Singapore and United States principle of having other constitutional rights applied to property would create a two-part defense: a right to property and a right to constitutional interests in that property, such as non-discriminatory treatment in expropriation land selection. The United States supplements the defense with a finding of property interest with a person's other constitutional rights since the constitution applies to the people.[883]

Switzerland extends the right to property to deleterious regulatory takings at the federal level, and some cantons prohibit private-to-private takings identical to some U.S. states. The Swiss constitution harmoniously permits zoning regulations and compensates landowners when the land-use restrictions create an appreciable impairment to property interests. Therefore, municipal zoning that bars most use and development of property constitutes a taking, even when the title remains unaltered. Switzerland estimates a loss in property value exceeding 20% as the transition between a reasonable land-use regulation and an indirect expropriation. The U.S. cases where 90% or more of the property lost its present utility would not prevail under the Swiss test, even if the threshold rose to 50%.[884] Compensation for regulatory takings is imperative given the lower judicial scrutiny and near-limitless inconveniences imposed. The U.S. constitution does not reference regulatory takings, and usually, no compensation award is guaranteed when a regulatory

taking occurs. The regulation is justified under the state's police power, and the landowner kept the property title, meaning the regulation is not a *per se* expropriation. Defenses recognizing compensation for regulatory takings and severe land devaluations would persuade judges, who only have unsound equity arguments, to combat regulatory takings that may be overturned with the municipality's appeal.

Switzerland extends property as an institutional right and order of economic freedom, meaning no society in the present or future can restructure property under a centrally planned system or empty property of its wealth creation abilities. This gives property the status of a national interest instead of a revocable privilege or gift. Switzerland is a civil law country with parliamentary supremacy; thus, the Federal Assembly could enact laws that conflict with the constitutional right, and Switzerland prefers popular initiatives over judicial supremacy.[885] Under the common law or a constitutional economic order, society's connection to property dictates how the government branches *should* treat property despite the weak legislative protections. In Singapore, public outrage and publicity made the *ex gratia* payments politically profitable: without a legal obligation to pay additional compensation, the government provided some recourse to alleviate the unintended consequences.[886] A true dictatorial regime would have ignored the public's complaints, notwithstanding its moral sentiments about property. Meanwhile, Singaporean society and its administrative agencies validated property's importance when the *autonomous*, *normative* response to expropriation abuse was benevolence. The U.S., Singapore, and Switzerland set out to foster a free-market system, but each has managed expropriation with distinct approaches. Switzerland and some U.S. states have a comprehensive compensation scheme with constitutional affirmation, while Singapore paid below fair market value for a large portion of the country and barred landowners from easily questioning the taking's legitimacy.

Swiss economic freedom and property-as-an-institution offer more reasons to cure direct and *indirect* expropriations equitably, and judges have adjudicated the various circumstances with persistence at respecting property rights.

Due Process. All Studied Nations share procedural due process protections. No matter the severity or scope of the taking, the landowner has an opportunity to be heard and at least one additional level of appellate review. The government's expropriation is invalid when it fails to comply with the landowner's procedural rights to notice, a hearing, and a non-discriminatory selection when expropriating specific parcels.[887] Unlike a right to property or compensation, the Studied Nations equate access to justice and procedural rights throughout the taking as a requirement of natural justice.[888] The use of international agreements may heighten the standard of judicial review for property and supplant the difficulties in ratifying a quasi-constitutional property protection.[889] The controversy surrounding the inclusion of property rights into international rights demonstrates the potential authoritativeness of ratified international treaties on courts worldwide.[890]

Due process has been used in the U.S. to create economic constitutional rights. Regulating business without a legitimate, necessary public interest can violate the state constitution's due process clauses.[891] The Texas Constitution's due process clause replicates the Swiss constitutional protection of economic freedom. Economic regulations violate Texan substantive due process when "the statute's actual, real-world effect … is so burdensome [to the victim] as to be oppressive in light of, the governmental interest[.]"[892] In Tennessee, regulations must have a substantial relation to the public interest that the government intends to protect, and it cannot rely on an unsubstantiated, generic claim that the regulation will benefit public health, safety, or morals.[893] Overall, U.S. states have enacted provisions to protect economic freedom when the federal

government remains silent; meanwhile, the Swiss have a standalone federal right to economic freedom.[894] Most state due process clauses do not substantiate a right to economic freedom, meaning each state varies in its reasoning to preserve economic interests.[895] The Swiss federal rights are outstanding, but the omission of cantonal protections offers fewer layers of protection if a federal statute or referendum quashed the normative federal rights.[896]

Public Use. The public use justification should be prescriptive to avoid vague terms encompassing indefinite state activities. A country with judicial review may require the judge to act with judicial supremacy as she guesses and establishes common law tests about when activities qualify as unconstitutional takings. Not all government actions qualify as public uses, but when Parliament fails to enumerate the bases to expropriate, Parliament is deferring to the judiciary to decide when the government acts unconstitutionally. If Parliament makes a broad statute and the judiciary gives deference to Parliament, then *public use* challenges have no foreseeable success. The United States' traditional public use test was the most restrained and directive definition, but today, the federal government and the states have implemented either a *public use* and *public benefits* test, or a consolidated *public purpose* test. In essence, the public use test looks for a public right of access or "asks whether the public has a right to a definite use of the condemned property[.]"[897] The public benefits test "asks whether some benefit accrues to the public as a result of the desired condemnation[.]"[898] The public benefits test enlarged the scope of permissible expropriations to contentious benefits, such as more employment and increased property taxes.

All the Studied Nations recognize blight to justify expropriations. It is only U.S. states – Florida and New Mexico – that have prohibited blight justifications, and instead, municipalities exercise their power-to-abate-nuisances to stop health and safety problems. As an alternative, the Institute for Justice's *Model Eminent Domain Legislation* mirrored other state laws itemizing the

type of building code violations that qualify a parcel as blight,[899] which converts "blight" from a catch-all to a well-defined term.

The legislature should prescribe features on land that qualify as blight and how the municipality allocates sufficient time for the landowner to fix those features.[900] For instance, in Minnesota, blight exists when remedying building code violations would cost over 50% of the assessed property value to restore the property to the building code compliance.[901] Thus, an unkept indigent house that generates fewer property taxes is not automatically blighted for eminent domain purposes unless curing the defects warrant purchasing a new house. Governments should test blight parcel-by-parcel to not punish one non-blight property near blight properties; otherwise, compliance with municipal ordinances does not reward the landowner for maintaining her home or business. All the Studied Nations have vaguer public use tests, making the U.S. modern trend the prevailing international trend. Although the law should uphold private rights instead of destroying them, landowners can request – at least – an adequate, secure remedy from the weakened public use test.[902]

Private-to-Private Takings. All the Studied Nations allow private-to-private takings, with Singapore being the most unrestrained and Switzerland having the most government oversight. Singapore has allowed any government request to be a valid public use while Switzerland requires private plans to be reviewed and monitored by the applicable government agency as a condition to taking someone else's land.[903] Most U.S. states reject *Kelo*'s application in their state procedures by statute or constitutional amendment.

Besides restoring the traditional U.S. public use standard, the people should vote on legislative language that specifies the activities constituting a public use. A public vote on eminent domain justifications requires more citizens to contemplate the issue and facilitates more external

oversight of the legislation or ordinances – the legislature and the people vote similar to a constitutional amendment. However, such a vote could threaten property rights based on how the legislature designed the proposed public use statute. Absolute discretion to the legislature to draft public uses has led to broad, limitless terms in the Subject Nations and the *Kelo* case.[904] The Swiss process allows both the government and the people to participate in the determination of a public use through a referendum; however, defining the public use in the constitution may conflict with the existing constitutional right to property. A right to property was added to the 1960 Constitutional revision to ensure the cantonal, traditional guarantee of property withstands the new federal zoning powers.[905] The public interest is given no higher weight than the right to property,[906] but a court may prioritize the constitutional public interest over the right to property unless the judge considers property sacred to a free government.[907] Likewise, Parliament may unilaterally designate specific land-uses as national interests. More public participation or judicial scrutiny of the eminent domain power[908] can prevent absolute or corrupt outcomes: e.g., the government's eminent domain notice is sufficient evidence of an indisputable, legitimate taking. The only risk in this approach is the propertyless-majority voting with disinterest about what happens to private property they do not own.

The Holdout Problem. As a reminder from Chapter 2, a *holdout* arises when an expropriator must acquire numerous, contiguous parcels of land from different landowners before the project's development.[909] One or a few landowners negotiate greater sales proceeds than other landowners, or the landowners' counteroffer of sales proceeds exceed the fair market value of the property.[910] The probability of a holdout increases proportionally as the number of landowners, who must forcibly sell their property, increases.[911] The landowners' refusal to sell their property

voluntarily to the expropriator may thwart or delay the project enough to make the project unprofitable to complete.[912]

The landowner will overprice their property while the government will underprice, and this offer-price-versus-ask-price disparity is the *endowment effect*.[913] In a holdout, the landowner's refusal could be motivated by sentimental value to the land, insecurity about the landowner's replacement home or business, or a profit motive.[914] An expropriator's spontaneous offer to purchase the property subjects the landowner to an anchoring bias[915] regardless of any profit motive.[916] The landowner may be uninformed about her property's market value and presume the expropriator's offer as approximating market value.[917] Expropriators are incentivized to underbid since the landowner will normally negotiate with a higher asking price. The uninformed landowner's counteroffer will approximate the fair-market-value of the land as a result of the anchoring bias.[918] Holding the landowner's motivations constant, a landowner will increase her sale price the longer she negotiates or delays the negotiation,[919] or when the landowner litigates the expropriator's price offer.[920] This may explain why New Zealand has a generous signing bonus for landowners agreeing to the compensation package within six months of their notice of intent to take the land. The signing bonus discourages landowners from litigating the expropriation for the extra percentage points of compensation.

Despite the holdout problem, "[t]he usual presumption is that the exploitation risk is greater than the holdout risk[,]" according to Professor Richard Epstein.[921] The government's unchecked taxing and eminent domain powers allowed the private expropriator to claim tax exemptions or government contracts with the newly expropriated land.[922] Eminent domain has been a negotiation tactic to threaten litigation with the landowners for disagreeing with the presented offer – establishing no good faith negotiation.[923] Landowners will bargain due to threatened litigation,

which causes indigent landowners, who cannot afford to litigate, to relinquish their property below fair market value.[924] Landowners can retaliate by overinvesting in the condemned property before the valuation date, thereby increasing the assessed value, because the landowners have no other bargaining power.[925] Therefore, municipalities should refrain from threats or exercises of eminent domain until the holdout problem becomes unmanageable.[926] The public use test was intended to preserve private property, not to mitigate holdout liabilities,[927] especially when expropriators have other strategies to confront holdouts: secret buying agents and option agreements.[928] New Zealand, Switzerland, and U.S. policies encourage good faith negotiations with landowners, finding coercive government actions illegal or unconstitutional. The real issue is ensuring good faith negotiations occur when indigent landowners cannot afford to litigate breaches of good faith and fair-dealing.

Proportionality & Judicial Review. The Swiss proportionality requirement, balancing the important private interests with the necessary public interests,[929] demands consideration of the private interests and other public interests before an expropriation and regulatory taking becomes effective.[930] Therefore, the public interest justification must demonstrate stronger reasoning when the private interests are disproportionally impacted, suffering a greater harm. The government's obligation not to expropriate more than what is required to achieve the public interest further restricts the ability of an expropriating authority to use a public interest justification to take surplus land or for the government to hoard land.[931] In the U.S., governments cannot condemn more land than what is needed to complete the public work.[932] Nevertheless, the *Kelo* and *Berman* cases granted the State legislatures the power to determine the quantity of land necessary for a public project, making project plans difficult to disprove.[933] State legislatures have ratified statutes permitting excess condemnations to save the government money.[934] In New Zealand, all land taken

for a public work must be required in some way to fulfill the public work now or in the future, even if the property is only used in construction or to relocate another public work.[935] In Singapore, the government can take more land than necessary to achieve the public purpose,[936] but the landowner can object to the taking's size.[937] Overall, the American Maxim is the international benchmark, "It is the principle of all free governments, that no right of the citizen should be surrendered to the sovereign, that is not necessary for the purposes of government."[938]

In theory, the proportionality test is unilateral protection customarily favoring the landowner;[939] however, proportionality with vague interest balancing could be used against landowners: such as combining the interests of the private beneficiary and the public benefits of urban development. Balancing tests may undermine property rights and supplant the legislature with an immutable officer deciding the new scope of property regulations.[940] Contrarily, absolute discretion to government agencies removes all potential policy arguments to defend low-income landowners from expropriations.[941] As a recommendation, the proportionality test should exclude the private beneficiary's interests throughout a private-to-private taking.[942] Stricter judicial review is warranted in private-to-private takings, if legal in the jurisdiction, though a different judicial treatment remains unseen in the Studied Nations.

The Swiss and U.S. statutes express what actions qualify as a public use because the democratic representative identifies its constituents' public interests, unlike a judge or the state actor.[943] Switzerland's public vote on constitutional public interests adds more barriers to adding new public interests that could be used against the rights to property and economic freedom. Nevertheless, the legislature must clearly define *what* qualifies as a public interest so that both the executive and the judiciary do not need to guess what activities satisfy an overly broad definition. Amending the enumerated lists of public uses with a legislative and public vote could eliminate

broad eminent domain justifications on condition that the legislatures do not propose a broad myriad of public uses to ensure no project is stalled based on a technicality.[944] Under constitutional and judicial supremacy, judges have an imperative duty to find whether the legislature's public interest:

(1) violates the constitution,

(2) interferes with the fundamental rights of third-parties or minority interests,

(3) is used by a government agency to exceed its authority or to impose unreasonable restrictions,

(4) ensures the eminent domain power is exercised for a designated public use and not a pretext, or

(5) is necessary and beneficial to the community.[945]

Undoubtedly, when given the opportunity, legislatures will draft broad public use statutes, but the court may need to have a judicial test for ambiguous public use statutes[946] or to construe ambiguities and proportionality in the landowner's favor.[947] A statute authorizing expropriation to create housing or a cemetery,[948] for example, is definite and easier to test compared to "any economic development."[949] The court validates an unenumerated governmental action and the public use when it allows a public interest justification not expressly within the statute. Lower courts tend to enunciate the vague statutory rules, and indigent condemnees lack the funds to appeal to higher appellate courts that may deviate from the all-encompassing statute on policy grounds.[950] The judge holds an overwhelming power when someone risks home eviction or business closure based on that judge's opinion. The jurisdiction becomes "tyrannical, and exposed to vast abuses" when the judges and municipality fail to respect private property as contracted between the government and its people.[951] As the Supreme Court of Illinois once found, "[i]t is

incumbent upon the judiciary to ensure that the power of eminent domain is used in a manner contemplated by the framers of the constitutions and by the legislature that granted the specific power in question."[952] In short, for broad public uses, a heightened standard of review is necessary to preserve the *public use test* as a government limitation, to punish the legislature for seeking administrative convenience and to verify that the *public* and not the *private* interests are being advanced.[953] In favor of landowners, Switzerland and some U.S. states correctly eliminate the discretion endowed in government agencies. Ideally, the people or landowners will have input via votes on *what* specific works specifically qualify for the public use statute without risking the right to property with a broad public use proposal.

Public Ownership, Private Operation. Nobody reasonably agrees to have private-to-private takings due to government lobbies, bribes, or mala fides;[954] however, some people may prefer the private-sector to operate the public work after the expropriation is completed.[955] Privatizing commercial-in-nature government functions would comply with the constitutional economic order and grant lawsuits against the public work's injurious affection without governmental immunities.[956] The problem is how a private activity has been deemed a public work. Somehow one person's business activity is more important to the public than another person's business or livelihood.[957] Justice Thomas's actual use test would be easier to administer to avoid injustice: either the general public has a right to access the property, or the government owns the property while it or the private sector conduct the public work.[958] When the use is no longer necessary, the landowner can repurchase property interest. The actual use would nationalize *some* property, but it allows separation of the profits and ownership. The government owns the property until that specific public work is no longer productive, while the private company cannot hold the land as a balance sheet investment: i.e., property, land, and equipment. Neither the public nor

private entities benefit absolutely from the compelled consumption of someone else's condemned property. The private sector's possessory interest ends after the public use has been exhausted. Once the private sector leaves or does not renew the lease, the landowner may notice the public work's abandonment visually or through a paper trail, entitling her to the buyback procedures from that lapsed renewal date.

What about government ownership of natural resources and delegating the management and profit to a private company? New Zealand and Singapore enables state-nationalized resources, but the U.S. and Switzerland would probably consider a state's mass confiscation of a certain property interest as unconstitutional.[959] To be sure, a public use test should ban substantial state ownership of natural resources, for it limits private competition, individual use, and new market entrants.[960] Nationalizing property to solely lease it back to the current owner does not create a beneficial public use. Using rents or royalties to increase public revenues would contravene the constitutional economic order, economic freedom, and the security of property. The resumption or abolishment of a property interest is a grave offense to all of these rights.

The eminent domain power should be kept separate from private persons. The U.S. and New Zealand sometime separate the private entities from the compulsory acquisition power, while Singapore and Switzerland tolerate a private expropriator power subject to some administrative review. Although Singapore and Switzerland appear to have no cases of private entities committing fraud when they wielded the expropriation power, landowners have better security with government oversight and control of the power than a private entity persistently applying to execute the expropriation power through different legislations.[961]

Leasing. None of the Studied Nations discuss leasing in lieu of expropriation as a solution. Leasing the condemnee's land, instead of expropriating the property, could compensate the

landowner throughout the forced lease term at the leasehold's net rental value through rents or royalties. Analogously, the Japanese or South Korean *Land Readjustment* systems incentivize landowners to cure their blighted neighborhood independently.[962] Neighboring proprietors voluntarily assemble their land for redevelopment in exchange for a proportionate share of all the accumulated land to enjoy or sell, at higher property values, after the rehabilitation.[963] Landowners who reject the Land Readjustment may receive the standard compensation scheme.[964] The problem is the private company's option to expropriate the land whenever the adjusted rent or royalties become too high, or negotiations reach a stalemate.[965] The government may decide to keep the rental income as government revenue by acquiring title and leasing the property to the private company.[966]

Other Protections. Switzerland has the most versatile constitutional protections of private property. The federal right to property expressly mandates full compensation for expropriations and regulatory takings reflecting the same harms as an expropriation. An institutional guarantee, a market-economy legal order, and an assurance that wealth can be accumulated are constitutional doctrines protecting property rights. Article 35 of the Constitution carries the property protections throughout the legal system and obliges the government to draft and interpret laws in compliance with these doctrines. The right to economic freedom safeguards property used to conduct a profession: e.g., a small business or farming. The Spatial Planning Act gifts farmland special protective status as a public interest and preserves the profession and the nation's food supply. Many U.S. states have outstanding nuanced protections as well, but they are spread across each state: Missouri recognizes heritage value, Michigan offers a compensation premium, Oregon pays for regulatory takings, and the Texan due process clause alleviates harms to economic freedom.

The United States has used the Fourteenth Amendment to create unenumerated constitutional rights and equitable principles to restore economic constitutional rights.[967] The Swiss have used their constitutional legal equality to protect adversely affected landowners. Legal equality demands compensation for the landowners' disproportionate public burden when a few landowners incur unique hardships from a property ordinance.[968] The United States relies solely on the Takings Clause, instead of equal protection like Switzerland, when a regulation eliminates all economic viable uses for a few proprietors.[969] Conversely, legal equality impacts the cantons from offering more compensation than the federal standard through an automatic compensation premium. The U.S. state constitutional premia[970] would not comply with legal equality,[971] making the U.S. outperform Switzerland compensation where state expropriations exceed fair market value. A federal signing bonus could apply to Swiss federal expropriations because, like New Zealand, the federal laws cannot conflict given stringent parliamentary supremacy.[972]

U.S. states that offer a compensation premium rectify many hardships that may otherwise be unrecoverable: business goodwill, lost profits, relocation costs, sentimental value, or the government's undervaluation of the property. The higher compensation requirement will discourage poorly planned expropriations or land hoarding. Most states abhor excess condemnation as an investment.[973] The constitutional requirement for limiting and compensating eminent domain ensures that the rights are self-executing. The legislature does not need to authorize recovery for a specific wrongdoing. The taking or inverse condemnation creates a duty to pay compensation.[974] The common people need more autonomous processes since busy lifestyles and the lack of legal expertise makes monitoring the eminent domain procedure a futile, overwhelming endeavor.[975] One collective problem with the U.S. and Switzerland is the variability in notice requirements. In the U.S., surveys and searches for the word *land use* in state appellate

decisions reflect the prevalence of eminent domain in research.[976] However, this erroneously presumes landowners appeal or notify the world of their expropriation cases or regulatory takings. Some landowners may capitulate out of fear, insufficient funds to litigate, or careless review of the agreement to expropriate. New Zealand and Singapore have gazettes that display all the notices and settlements to the public on expropriations conducted every year.[977] For research into access to justice and eminent domain abuse, transparent reports of when a condemnation notice is issued and when a settlement is reached would accurately measure whether the problem is prevalent nationwide.

Compensation. The Studied Nations and the United States, customarily, expect the expropriator to pay the fair market value of the confiscated property contemporaneous to the actual taking. The American jury trial could be sympathetic with the compensation award, but it is not required if a reasonable premium is awarded and costs related to the expropriation are reimbursed to the landowner. A jury trial may be superfluous when the compensation award indemnifies or enhances the landowner condition. The Studied Nations differ on their reimbursable consequential damages, including, but not limited to, valuation fees, relocation costs, lost profits, and goodwill. The above fair-market value bonuses hinder the government's attempt to underestimate the property appraisal below fair market value and insures the landowner in the event some costs are not reimbursed.[978] An expropriation regime's objective should be to have the price indemnify the landowner and reflect the social cost of the public work.[979] The government paying 5% less than fair market value does not account for the community or personal impact of the displacement, regardless of whether it adequately indemnifies the landowner.[980] If the project is unnecessary, the government may be reneging its fundamental maxim to treat property as sacred.[981] New Zealand's compensation bonus has fixed monetary thresholds and requires the landowner to settle without

litigation. If we put cultural differences aside, New Zealanders tend to execute a settlement for the signing bonus more often, potentially because the award is a reasonable substitute for disclaiming the land.[982] This could support the proposition that a bonus of 22% alleviates the condemnee's endowment effect – feeling under-compensated.[983] New Zealander proprietors with residential properties approximating $205,000 or less would feel satisfied with the compensation bonus and settle. Meanwhile, some U.S. states and Swiss cantons charged the premium without the contingency of signing a settlement within six-months, like in New Zealand, and the premium increased as the government takes more land. Sentimental value is unpersuasive in most states, but the landowner can substantiate her years of residency or business occupancy as a legal test.[984] New landowners, of six years or less, have no reason to acquire a premium on sentimental grounds because the time to foster a long-standing connection with the land is unfounded. Furthermore, the fair market value of landowner's recently purchased land is less disputable – the compensation award will approximate the recent purchase price. The length of ownership as a precondition for a premium disincentivizes people purchasing land near expropriation projects in contemplation of holding out for the premium, especially insider-government-employees looking to capitalize on the undisclosed expropriation plan. Although the size of the premia relies on the legislature's objectives, the research concludes that premiums or bonuses are practical and expected in high-ranking countries concerning property rights.

The judge should not depreciate the property's appraised market value based on the government's notice to the world about the expropriation, thereby influencing market prices. In Singapore, the public notice creates an expropriation discount for the government, but this fails to indemnify the landowner when she purchases a replacement residence or brick-and-mortar store at fair market value. Similarly, declaring capital improvements on the property as sentimental to

reduce the compensation award does not redress the landowner's relinquished betterment to the property.[985]

Paradoxically, the U.S. federal government has the potential to produce a greater hardship to landowners than state and local expropriations. Most states reformed their laws after *Kelo*, and some states surpassed the top-ranking nations with premiums, heritage value, and consequential damages. Converting the Uniform Real Property Acquisition Policy from a guideline to binding rules could raise the United States' rank in property rights and consequently ensure better protection of landowner rights.

Inverse Condemnations. A better property rights arrangement would compensate expropriations *and* inverse condemnations for interfering with or depriving the owner of using the property. Interference is proven with the government's physical invasion, property damage, or the stoppage of all the property's economically viable uses.[986] Switzerland and the U.S. acknowledge regulations can convert into an indirect expropriation when previous, current, or government-notified future use is stunted, thwarted, or made impossible. The government's gradual restrictions on the land's use over the years could have a cumulative effect of taking the property, which should be a compensable regulatory taking. Switzerland's over 20% reduced market value estimate may serve as the new baseline. In brief, the regulatory taking's compensation award rehabilitates the landowner for the government's breach of trust and ensures the government is not creating regulations to take land indirectly without paying compensation. In Switzerland, the compensation for regulatory takings is compensation for the government's breach of trust,[987] such as when the municipality changes a property zoning after applying for a development permit.[988] If the regulation is unlawful, then similar to the Studied Nations, the landowner is seeking damages for the illegal regulation or taking.[989]

The government should not attempt to bypass the compensation requirement. New Zealand and Singapore do not compensate regulatory takings unless the statute provides otherwise, making extensive regulations substantially cheaper than outright takings. In New Zealand, nationalizing resources has evaded the compensation requirement. In Switzerland, zoning changes are not permanent, but municipalities should compensate the landowner's reasonable reliance on the municipalities' reassurances that land-use will remain unaltered during a private development. A compensation claim arises when the government changes land-use regulations to prevent the landowner's foreseeable plans after submitting a permit or variance application. The landowner should not assume the risk of losing her development expenditures in relying on the government's current zoning plans. The compensation for zoning alteration would be the difference between the value of the possible use to the current restricted use. The land-use regulations should contain a particular description of what the government agency expects to achieve. The description will identify the public use in zoning changes or condemnation orders.

If the regulation's harm "goes too far[,]"[990] the sunk development costs and reduction in land value corroborate the severity of a regulation's interference with private property.[991] This evidence restricts the judge from deciding whether conditional permits – restrictions on the property as a precondition to build on the property – are compensable regulatory taking because the harm is measurable. The state must compensate for any burdens that substantially outweigh private and other public benefits from continued use, and the state's police power should not thwart landowners rectifying the zoning harm.[992] Government actors entering the property should only perform non-destructive activities until the landowner's appeal is complete, assuming there is no exigency that the court will review later.

Taxation. The Studied Nations do not tax the indemnifying portion of the compensation awards, but Switzerland does tax the advantages from removed land-use regulations.[993] Landowners spontaneously find a value-added tax and increase property tax attached to their property regardless if the landowner voted or requested land-use amendments. Taxing nonmonetary zoning benefits should be discouraged.

Buyback Procedures. The government should not take more than what is necessary to complete the public use. Courts should encourage the government to find alternative sites before a court concludes the government's consideration of alternatives as adequate.[994] Moreover, courts should not tolerate the government banning certain public works on public land to justify expropriating additional private land.[995] Landowners may feel more indemnified when they can repurchase the property after it is no longer in use or was never put into use after a reasonable time. In such cases, New Zealand requires the landowner to pay the expropriated land's current fair market value with the public work's capital improvements. Since commercial property is more profitable than houses, the repurchase and reconstruction costs may exceed the property's value from the time of the expropriation. A landowner wishing to restore such property to its earlier use would need to purchase the public work at increased market value, demolish the building, and rebuild their former residence or small business. To avoid this, Switzerland reflects the impossibility of restoring the land in the repurchase price. Some U.S. states[996] and Switzerland set the repurchase price as the return of the compensation award, which discourages government land-hoarding to merely increase their capital gain realization and land appreciation before the landowner's buyback. The New Zealand statutes contain no buyback provision for small businesses and farm corporations. Only individuals can repurchase the property; therefore, a farmer must evaluate whether the lower taxes and personal liabilities under a farm corporation

exceed losing the farmland without a buyback right. The buyback right needs to be non-negotiable. The expropriator may offer a New Zealand signing bonus to the expropriation agreement that requires the landowner to contract-out her right to repurchase the property.[997] Even if the landowner raised the defense of bad-faith dealings,[998] the landowner would need to repay the condemnation award in addition to court costs to revive the buyback right.

Whether the expropriator continues to use the land for the particularized public use preconditions the buyback opportunity. The question can encourage governmental delay when the government can reassign the public use to a different use if they holdout selling the unused land. A pretext (ulterior public use) may have existed when the expropriated land is immediately converted to a different "public use" after the eminent domain procedure.[999] The prompt diversion of the expropriated land's use from one public use to an unrelated public use should trigger an investigation or appeal right to audit the new public use as justification for acquiring the property under the formerly stated public use.

Procedural Protections. All the Studied Nations have an appeal procedure with limitations. The question is purpose and efficiency. The U.S. is the only jurisdiction where every component of the expropriation is a justiciable question, and a common-law rule could assist the landowner or overturn legislation as unconstitutional. Likewise, a landowner can select the venue: state or federal court.[1000] If the state has an affinity for zoning and no eminent domain reform, the landowner can eliminate the home-state bias and sue in federal court. A civil code system (Switzerland), ouster clauses (Singapore), and parliamentary supremacy (New Zealand) minimize the litigation questions or scope of recovery. Litigation is efficient when multiple levels of review of various issues are collectively raised in one appellate, linear structure. Comparatively, appealing in one tribunal for public uses and a different tribunal for compensation issues increases litigation

costs, and it contravenes the common law presumption in favor of one-stop adjudication in private disputes to not prolong litigation.[1001] Appealing through one linear system is cost-efficient only if the lower courts recognize the importance of property rights; otherwise, the linear system loses its cost-efficiency since judicial predilections require appellate review to achieve justice. Switzerland and Singapore restrict what cases are heard while courts in New Zealand and the U.S. appear more open to all possible eminent domain disputes, except vexatious cases.

Why countries perform better than the United States in the property right rankings? Business executives participating in the WEF Survey may overrate property rights in their country due to nationalism, lacking experience with expropriation procedures, being uninformed about how well property rights are protected in their country compared to the world, or being only informed about how bad property rights are elsewhere.

The U.S. may have lower perceived property rights[1002] due to (1) the national newsworthiness of eminent domain actions,[1003] (2) the fact that the U.S. exercises eminent domain more often given its size and number of local governments, or (3) because more people participated in the WEF Survey with negative perceptions compared to the fewer individuals participating in the other Studied Nations – especially New Zealand having 77% fewer participants than the U.S. in 2019.[1004] American landowners' negative perception of eminent domain inflates as they associate greater sentimental value and endowment biases toward property.[1005] Where the business executive participating in the WEF Survey conduct business may tremendously impact their assessment of U.S. eminent domain law. Most takings occur in a few states.[1006] If the executive works in a state with bare-minimum eminent domain protections and frequent expropriations, they may be unaware of how other states compare against the top-ranking nations or unaware of those states that infrequently expropriate land.[1007] They may answer the WEF Survey biased by their

state's laws since these states exercise eminent domain more often than others. International participants may conclude that their nation's legal systems afford stronger protections of property rights because the government decides not to exercise its power; they don't have a reason to worry. However, as Justice Strong once said, "the non-user of a power does not disprove its existence."[1008] If the government did exercise its eminent domain power, the protections would be substandard upon further examination. A more meaningful redesign of the WEF Survey would ask international executives who have seen more than one regime or subnation to answer the property rights question. The international businesspersons may express less nationalism in their responses because they do not need to encourage foreign investment in the sole country where they conduct business.

The infrequency of expropriation or the majority of condemnees accepting expropriation agreements may explain the higher perceived property rights. Singapore has fewer properties to expropriate as it acquired over 90% of the nation's surface rights. With most property interests under government leases, Singaporeans sparingly litigate the expropriation to the first level of review: the Appeals Board had two published cases in 2019 and zero cases in 2018. New Zealand's bonus compensation has successfully dissuaded New Zealanders from appealing the expropriation with more notices declaring an agreement than Tribunal appeals in 2020. New Zealand and Singaporean[1009] culture decline to elevate the importance of property rights or replicate the minimum standard of the United States' Takings Clause. The culture accepts the current expectations, potentially raising the country's rankings.

Switzerland and the United States have more expropriation cases annually. Their societies' propensity to resist or detest government activity that impairs their property or economy may negatively affect the perception of expropriations. Surprisingly, the Swiss and American tendency

to litigate expropriation may derive from their more masculine cultures[1010] and the available constitutional property rights to plead. The omission of a judicial review process in a civil code system does not forestall the Swiss from litigating expropriations to the highest authority more than Singapore and New Zealand. Switzerland's and the United States' shared constitutional principles may have a greater influence on the number of appeals or those appeals reaching the Supreme Courts.

Interpretation & the Tyranny-of-the-Majority Problem. How constitutional rights are perceived determines whether the property rights are seen as a legislative gift or as naturally preexisting or supreme against all legislation. A natural right that supersedes the constitution ensures the legislature cannot revoke property rights at any moment, assuming the negative political consequences from the abolishment were null. The U.S. identifies property as an inherent right,[1011] while Switzerland assigns property rights a subjective legal claim and a binding authority on the state.[1012] Both achieve the same result. The Constitutions enumerate what legal positions rightsholders have against violations by state actors and the state's duty to protect the right.[1013] The pivotal advantage of the U.S. and Swiss federal constitutions is their onerous, lengthy amendment procedure compared to New Zealand or Singapore. Alongside the constitution, U.S. jurisprudence places property rights above the government to dissuade the possibility of abolishing property.

In relation to democracy, James Madison found humans' default state is to act selfishly with the potential to develop a safe civil society:[1014] "If men were angels, no government would be necessary."[1015] As a political scientist,[1016] he found the history of democracies to be an unstable government structure, "incompatible with personal security or the rights of property[,]" and ephemeral due to violent revolutions between the factional political opinions with adverse rights,

passions, interests to each other.[1017] Moreover, the government's structure – "separation of powers, bicameralism, and federalism" – inhibited political corruption and the tyranny-of-the-majority, not merely voting rights.[1018] The Framers had no intention of qualifying voter eligibility to a person's net worth, education, or family name;[1019] instead, they aspired to subdue the recreation of the corrupt British aristocracy voting system – where a small elite group owned all the land and were eligible to vote.[1020] The property ownership voting prerequisite was adopted, at least, to "avoid the ability for the rich to buy the votes of the poor."[1021] French diplomat Alexis de Tocqueville concurred that no system could remedy the precarious outcomes of democracy, such as legislative instability and popular laws that serve the administration's interest and forsake freedom.[1022] He opined that parliamentary supremacy threatened democracy given the overwhelming concentration of power after the majoritarian takeover,[1023] and he criticized American democracy as provoking conformity of thought: "with everyone's opinion equal to everyone else's in a democracy, intellectual uncertainties and anxieties about *what to believe* or *what to think* produce[d] a herd instinct ... only what is authorized by majority public opinion can be truthful."[1024] James Madison notified the world of a threat to the new United States:

> [T]he rights of property or the claims of justice may be overruled by a majority without property, or interested in measures of injustice.[1025] So strong is this propensity of mankind to fall into mutual animosities, that where no substantial occasion presents itself, the most frivolous and fanciful distinctions have been sufficient to kindle their unfriendly passions and excite their most violent conflicts. *But the most common and durable source of factions has been the various and unequal distribution of property. Those who hold and those who are without property have ever formed distinct interests in society*.[1026]

Legal historians boldly summarized Madison's verdict:

> [P]roperty would always be at risk in a republic because it would always be vulnerable to the dissatisfaction of the (inevitable) propertyless majority; and the vulnerability of property rights revealed the nature of the republican threat to individual rights, oppression by the majority.[1027]

Tocqueville further found that although citizens can keep their property, landowners "will be disregarded, ignored, overlooked, treated as 'an impure being,' deprived of esteem."[1028] The government is the instrument of the political majority that can violate property law without political recourse.[1029] As Justice O'Connor partially referenced in her dissent of *Kelo*, the Framers drafted the Takings Clause to protect against (1) the tyranny-of-the-majority, (2) the inability of the propertyless to acquire and keep their property, and (3) the politically powerful from expropriating from the poorer, uneducated, or disreputable landowners with no political leverage.[1030] Private-to-private takings based on special political interests could equate to the propertyless majority lobbying for property redistribution from the minority landowners in their favor.[1031] Thus, the *Kelo* court failed to strike down the politically powerful from using governmental bodies as an instrument to transfer property from one landowner to a more influential entity. The U.S. and Singapore have deduced that the separation of powers establishes a limited government with judicial review serving as a counter-majoritarian check on government actions.[1032]

Other countries were fearful of the tyranny-of-the-majority problem starting at the primary source: voting. Switzerland's sentiments and reluctance to universal suffrage derogated from fears of mob rule.[1033] Aristocratic elites in the Swiss capital were not the source of this fear because the cantonal constitutions controlled the election system: i.e., the small cantons found this to be a foreseeable problem.[1034] Singapore's founding father was unconvinced about universal suffrage as well, attributing a voting age of 40-and-older and having a family with children as worthier qualifications for voting.[1035]

One question is whether the tyranny exists despite its intuitiveness?[1036] Axiomatically, the majority could disregard the interests of the minority and systematically act towards advancing the

majority's economic interests at the minority's detriment.[1037] For instance, tenants have been known to vote in favor of fiscal spending and property tax increases compared to homeowners.[1038] Tenants consume less housing costs than homeowners of the same income level generally, and the net benefits from the public expenditures normally exceed the amount of property taxes shifted to the tenant's rent.[1039] A one-person, one-vote system could condone the voting majority to redistribute property to themselves.[1040] Lastly, voters' political ideology and educational attainment have a statistically significant influence on prolonging or dissuading eminent domain reform through electorate proposals.[1041] No journal appears to have investigated the veracity of whether non-landowners in first-world countries tyrannize landowners to the extent of Madison's or Tocqueville's concerns. Nonetheless, non-landowners' participation in expropriation decisions may skew the representation towards expropriation, primarily when non-landowners receive any net benefit.

Without challenging the importance of universal suffrage, the historical debate on voting may still have merit. As a minority population, especially in cities, landowners may not be able to express their desires for public spending with an increased millage rate or to dissent public financing of more expropriations.[1042] The majority can outnumber, outvote, and outspeak the minority voice or vote. Private entities hoping to acquire their neighbor's property and the propertyless majority, who attain a net benefit from the new spending or expropriation plan, may silence the voice of minority-landowners through votes.[1043] The argument to remove land ownership from the voting requirements derived from the growing trend during the Industrial Revolution. Most people who had wealth did not own property living in the city.[1044] As property ownership became inessential to more lifestyles, the minority-landowning population vastly outvoted the growing urban population because land-ownership remained a voting prerequisite.[1045]

A supermajority, as a prerequisite to enacting a proposal, may allow the landowner-minority's voice to have a chance to approve or dissent the majority's control under universal suffrage. The landowners who may be subjected to the project or would be taxed to build the project should have their minority voice be given a fighting chance against the popular vote. The legislature's inertia towards reforming eminent domain in the U.S. federal government, New Zealand, Singapore, and other countries have proven Tocqueville's paradox: landowners keep their land when it is politically convenient, but their property interests are continuously disregarded or diminished.

Federations have better eminent domain reform than unitary nations. Switzerland and some U.S. states holistically performed better in this property rights analysis than Singapore and New Zealand. One rationale may be the importance of states and cantons. The cantonal constitutions devised the precedent of Swiss property rights,[1046] and U.S. state eminent domain laws assisted in framing the federal eminent domain regime.[1047] When the federal government fails to act, the states take action. As U.S. Supreme Court Justice Sutherland correctly stated, "[d]enial of the [states'] right to experiment may be fraught with serious consequences to the nation. It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, *serve as a laboratory*; and try novel social and economic experiments without risk to the rest of the country [or try experiments that the whole country may not agree to ratify]."[1048] When the states engage a corrupt public work or enacts unjust laws, the corruption will not spread to the whole country since the new legal theory is controlled to a city or state.[1049]

In federations, lower-level governments compete under a Tiebout Hypothesis[1050] where every citizen has preferences and knowledge of different subnational governments, and citizens can move to communities that satisfy their preferences.[1051] The localities use laws, tax revenues, and public expenditures to entice new residents.[1052] For investment purposes, a landowner cannot

import another state's eminent domain law.[1053] Interstate and intercommunity competition influence "local legislatures to design or adopt new property regimes that are consistent with the preferences of local residents" or laws that would attract new residents and businesses.[1054] Lobbying fifty states or hundreds-of-thousands of small communities across America would be an administrative nightmare compared to convincing all the politicians in one convenient location, such as the capital of a unitary nation, to amend the law.[1055] Less populated jurisdictions would incur greater costs when residents emigrate to other jurisdictions that align with their preferences because the less-populated states adopted repressive eminent domain regimes.[1056] Although a local government is located in a state with unfavorable property rights, it can enforce ordinances or directives holding their jurisdiction to a higher standard: e.g., rejecting condemnations for economic redevelopment and paying a compensation premium.[1057] In fact, Tocqueville praised the U.S. for local government action, reasoning that the states legislatures were equally jeopardized to the tyranny-of-the-majority as the federal government.[1058] Broadly, subnational governments slow national trends, allowing the country to observe a state's policy or a new property regime over time. In unitary countries, the laws could change overnight, with every citizen having to tolerate the change. New Zealand's formation as a unitary state may have caused it to have a more authoritarian parliamentary supremacy system because there are no states: such as in the U.S., Switzerland, and Canada.[1059] Countries with federalism have a better success amending their property rights from the bottom-up – from the state and local level – rather than advocating the federal government to change the nationwide approach to expropriation.

Two reasons explain why some states enact extreme advantages for landowners as found in U.S. and Swiss substates: (1) culture or (2) a former history of eminent domain abuse. American values are less consistent than collectivist cultures concerning property rights.[1060] American views

on what kind of property protections should be favored are context-driven. A collectivist culture is less context-driven and more consistent in how far property should be treated as sacred.[1061] When the land can generate goods, such as cash crops, producers became more concerned about their ownership and protection of those commodities. Furthermore, the owner could reap her investment into the property with established exclusionary rights: repelling trespassers, conversion, or theft of those cash crops.[1062] Some U.S. states have more than 50% of their land as part of the farm industry, meaning more residents rely on these protections for their crops.[1063] Agriculture without property rights inhibits further investments into the business and more resources towards defending their current, stagnant operation.[1064] Strong property rights impact other industries by facilitating macroeconomic growth and entrepreneurial activities.[1065] Therefore, some states need property rights because of their economy and consequential culture considering expropriations as repugnant. Regarding state history, Oregon,[1066] Missouri,[1067] and Michigan[1068] experienced eminent domain abuse or excessive legal barriers that sparked a strong response by the residents, including amendments to the law. Here, the residents underwent or witnessed the hardship before taking curative action. Only southern states, such as Alabama and Georgia, held a societal intolerance to the *opportunity* for eminent domain abuse after the *Kelo* case.[1069] Therefore, public outcry from abuse or industries reliant on the land contributed to some U.S. states deviating from international leaders in property rights.

Why are property rights worth preserving? Property rights serve such an indispensable role that it earns the name as one of "the *ultimate* sources of economic growth"[1070] and "the guardian of every other right[.]"[1071] Strong property rights result in lower unemployment[1072] and greater economic growth, based on increasing growth domestic product ("**GDP**") under growth domestic investment as a percentage of GDP,[1073] or GDP per capita.[1074] Securing property rights

has consistently improved the well-being of a nation's most improvised populations, which contributes to the overall reduction of poverty with higher average national income.[1075] Secure property rights improve corporate transparency and corporate governance practices; thus, industries that conceal financial information and divert resources to mitigate expropriation risk, increases investor information asymmetry and inefficient resource allocation.[1076] When expropriation risk rises, firms invest in harder-to-expropriate assets merely to preserve wealth rather than efficiently growing their businesses.[1077] Stronger property rights also produce less political favoritism and uncertainty in ownership;[1078] If the people discover that Parliament reneged its promise to compensate expropriations or the courts failed to rescind expropriations for private uses, the people will not accept or believe the government cured the expropriation risk in the future.[1079] Property rights only thrive in a government with restrained corruption.[1080] Presuming the rule-of-law is enforced and government officials did not acquire most of the land through political entrenchment, property rights dramatically enhance an entire society's growth and standard of living, making a secure property law system a worthy public benefit.[1081]

CONCLUSION

There is no direct correlation between the complexity and abundance of legal property protections and a Studied Nation's property rights ranking via the WEF survey and other economic business research. Switzerland and the United States grant loftier property safeguards than New Zealand and Singapore, which outrank the United States. The evaluation of property rights among the top-ranking nations has shown greater insecurity within modern property rights regimes, with the United States' decline in rankings attributable to constitutional desuetude[1082] rather than

missing legal principles. The traditional interpretations are modified with new public interests and legal concepts that expand government powers without adjusting for property rights to preserve the balance between the fundamental rights and the state's power.

Despite the strong property safeguards already afforded, the United Stated can improve its property rights by examining the practices of top-ranked jurisdictions for property rights, but based on the law, the United States is underrated. Switzerland provided more protections and sophisticated defenses than the U.S. federal government's takings clause. A few U.S. states outperform or directly compete with Swiss federal standards concerning landowner defenses to eminent domain and regulatory takings. The United States can learn from New Zealand's public recommendation system in Housing Projects and compensation signing-bonuses, akin to a premium, that entice settlements and offsets abuse. New Zealand also compensates for business losses, injurious affection, and replacement property loans. The United States would deliver comprehensive compensation to landowners if it recognized the new concept of compensating extreme and moderate regulatory takings, at least at the state levels, and made the Uniform Relocation Assistance and Real Property Acquisition Policies Act compulsory under all federal expropriations.[1083]

The thesis's other findings are summarized below:

1. Generally, the WEF Survey properly ranks countries with better protections of property rights in higher quartiles than countries lacking those protections. However, the numerical value given to the top-ranking countries insufficiently reflects the substantive legal protections between the higher-performing countries. The United States' jurisprudence was undervalued numerically when it was ranked in the 30th percentile of property rights globally.[1084]

Nevertheless, the general observation was correct: globally, the U.S. performs above-average on property rights. Therefore, this thesis recommends placing less weight on the numerical rankings of the WEF Survey and more independent research in future studies. The WEF Survey and Economic Freedom Indices cannot serve as the primary authority to compare property rights between countries. The same principle may apply to U.S. State comparisons of state property rights because some states offer more protections or compensation compared to the top-ranking state: Alabama. Comprehensive legal research is necessary to improve the readers' decision-making on where to develop or invest in real estate. Based on the structure of the country and its laws, a transition in government could drastically impact property rights.

2. A federation with strong subnational rights is more likely to initiate eminent domain reform and protections of property rights than unitary countries. The diverse cultures, experiences, and industries found in smaller, local communities influence the local preservation measures needed to defend property rights. The state and local governments are more likely to take extraordinary measures to stop potential eminent domain abuse or to prevent a state's history of eminent domain abuse from repeating.
3. A country with constitutional property rights and economic freedom has greater certainty for landowners seeking relief when their land undergoes expropriation or excessive regulatory takings. The government's structure increases a right's sustainability and resilience than a parchment right that the legislature can effortlessly amend or repeal.[1085] Suggested protections include constitutional supremacy, a modest judicial review power, difficult-to-amend property rights, and a supermajority voting with the federal legislature and (1) the people or (2) the substate legislatures to decide crucial legal issues.

4. Top-performing countries in property rights indemnify the landowner throughout the expropriation process. Indemnification means a compensation award equating to the fair market value of the expropriated land, plus interest for delays, and some other damages or costs, depending on the jurisdiction. Compensating consequential damages, a signing bonus for the expropriation agreement, and a compensation premium above the property's fair market value are internationally recognized mechanisms to indemnify the landowner undergoing an expropriation. Reimbursing the landowner for transaction or relocation costs and business losses are also internationally accepted.
5. The periodicity and frequency of the government's expropriation power could influence the perception of a nation's property rights. People could believe a country will not or cannot readily take their property merely because the government has not expropriated much land recently or the current administration compensates landowners at fair market value. The WEF Survey is unreliable when the people don't know about the country's expropriation history: e.g., expropriating many parcels at below-market prices. The nation's culture or the international business experience of the WEF Survey participants may skew the results as well.
6. Given the Studied Nations in this thesis, Switzerland may serve as the model eminent domain jurisdiction for civil code countries with parliamentary supremacy, and the United States may serve as the model jurisdiction for common law countries with constitutional supremacy. The U.S. eminent domain laws are competitive with the top-ranking countries in property rights.[1086] Although lacking in unamendable substantive protections, New Zealand and Singapore demonstrate that general property rights are not a prerequisite to legislating a stable, equitable eminent domain process that would mitigate the displacement of landowners as much as

possible. For business executives in the WEF Survey, a transparent regime that compensates expropriations gives the perception of strong property rights despite the legal uncertainties.

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[1] See Chapter 2 for more information. World Economic Forum, *Insight Report: The Global Competitiveness Report 2019* ed by Klaus Schwab (Geneva, CH: World Economic Forum, 2019) at 633-634, online (pdf): *World Economic Forum* <http://www3.weforum.org/docs/WEF_TheGlobalCompetitivenessReport2019.pdf> ["Global Competitiveness Report 2019"]

[2] See Chye-Ching Huang, "The Constitution and Takings of Private Property" (2011) 24 NZULR 621 at 646 (contending that the property rights may not improve economic growth). Osvaldo Gómez Martínez and Lawrence King "Property Rights Reform and Development: A Critique of the Cross-national Regression Literature" (working paper, Political Economy Research Institute, University of Massachusetts, Amherst MA, 2010) at 16 (Martínez and King find inconsistency between property rights and infant mortality – attempting to argue greater infant mortality under countries with greater property rights regimes. The confusion and possible error derive from the author's model. The static data prove that infant mortality substantially reduces as property right rankings increase, but under the short-term change in property rights, the author attempts to prove property rights increases in the Heritage Foundation's property rights index, infant mortality increases and GDP per capita decreases. The authors' dynamic variation model fails to replicate these findings using the Fraser index rankings or the World Economic Forum data, and they attest that a 100% rise in infant mortality if a country increases their Heritage Foundation Index ranking by four units. variation fancifully measures short-term variation in property right. Opponents would argue, over the long-term, an increase in property rights increases life expectancy. The authors' selection of short-data (e.g., the years of ranking) to create their dynamic variation remains undisclosed to the reader. at 13–14, 26 (Table 4)).

[3] Niclas Berggren, "The Benefits of Economic Freedom: A Survey" (2003) 8:2 The Independent Review 193 at 195–96, 202. See also Jac Heckelman & Michael Stroup, "Which Economic Freedoms Contribute to Growth?" (2005) 53:4 *Kyklos* 527–44 (Earlier versions of the indices do not have a statistically significant correlation between economic freedom and the desired result: economic growth); Jac Heckelman & Michael Stroup, "A Comparison of Aggregation Methods for Measures of Economic Freedom" (2005) 21:4 European Journal of Political Economy 953–966 (The weighting of each criteria, such as the measurements of property rights, "fails to reflect any conceptual link between the economic theory behind the selection of the elements being aggregated and the aggregate index value itself" at 957).

[4] This Question does not ask for a comprehensive research comparison of the Studied Nations' procedural and court rules.

[5] "Bundesgericht" online: *Bundesgericht* <www.bger.ch>.

[6] "The Federal Council: The portal of the Swiss government" online: *Schweizerische Eidgenossenschaft* The <www.admin.ch>.

[7] Omitted discussions due to the Thesis manuscript page limit include a discussion of International Covenant on Civil and Political Rights, the Universal Declaration of Human Rights, the New Zealand application of natural justice, a right to good faith and protection from arbitrary state action in Switzerland, and taxation as an expropriation in Switzerland.

[8] See Bundesverfassung [BV] [Constitution] Dec 31, 1999, SR 101, art 189, para 4 (Switz) ["BV"].

[9] *Ibid*; Jörg Paul Müller & Schefer Markus, "Sechstes Kapitel: Garantien fairer administrativer und gerichtlicher Verfahren / C. Garantien gerichtlicher Verfahren / I. Rechtsweggarantie" in *Grundrechte in der Schweiz, Im Rahmen der Bundesverfassung, der EMRK und der UNO-Pakte*, 4th ed, (Bern: Stämpfli, 2008) (referencing Art. 29a und 32 Abs. 3 BV).

[10] *Ibid.*

[11] See Giovanni Biaggini, "Art. 26 Eigentumsgarantie" in *BV Kommentar, Bundesverfassung der Schweizerischen Eidgenossenschaft*, 2nd ed, (Zürich: Orell Füssli, 2017) at 1 [Biaggini, "Art. 26 Eigentumsgarantie"]; *Erie R Co v Tompkins*, 304 US 64 at 78 (1938)
(the United States Erie Doctrine originally meant that Federal Court must follow state substantive law except for issues relating to the Federal Constitution, Federal Statutes, or international law). See also *Day & Zimmermann, Inc v Challoner*, 423 US 3 at 4 (1975) (citing *Klaxon Co v Stentor Elec Mfg Co*, 313 US 487 at 496 (1941)) (the U.S. Federal Court must follow the forum state's choice of law rules: i.e., the choice of law rules where the federal court resides).

[12] See Pascal Mahon, "Judicial Federalism and Constitutional Review in the Swiss Judiciary" in Andreas Ladner et al, eds*, Swiss Public Administration. Governance and Public Management* (Palgrave Macmillan, 2019) at s 8.3.1.1 (decentralized constitutional review).
[13] See William Ewald, "Comparative Jurisprudence (I): What Was It Like to Try a Rat?" (1995) 143 U Pa L Rev 1889 at 1976–77.
[14] See John Reitz, "How to Do Comparative Law" (paper delivered at the "New Directions in Comparative Law" Symposium, 1998), (1998) 46 Am J Comp L 617 at 631.
[15] See Alvin Podboy, "The Shifting Sands of Legal Research: Power to the People" (2000) 31 Tex Tech L Rev 1167 at 1171.
[16] See Reitz, *supra* note 14 (a complaint in 1998 was how civil law countries do not publish their decisions with "the thoroughness and persistence of common law countries." In Switzerland, *Swisslex* has ameliorated this concern significantly).
[17] Ewald, *supra* note 13 at 1986–87; Anna di Robilant, "Big Questions Comparative Law" (paper delivered at Ran Hirschl's Comparative Matters: The Renaissance of Comparative Constitutional Law, 2016) 96 Boston UL Rev 1325 at 1338 (comparative historical analysis can enlighten reads on the "property cultures" within each nation).
[18] See Kirk Junker, "A Focus on Comparison in Comparative Law" (2014) 52 Duquesne L Rev 69 at 96, 98–99.
[19] See Ewald, *supra* note 13 at 1986–87.
[20] See *Karuk Tribe of California v United States*, 41 Fed Cl 468 at 471, 476 (1998), aff'd sub nom. *Karuk Tribe of California v Ammon*, 209 F3d 1366 (Fed Cir 2000) (The federal government can expropriate aboriginal title or restructure reservation borders by executive order or statute at any time without just compensation); *Confederated Bands of Ute Indians v United States*, 330 US 169 at 178–80 (1947).
[21] See Nigel Bankes et al, "The Recognition of Aboriginal Title and Its Relationship with Settler State Land Titles Systems" (2014) 47 UBC L Rev 829 at 871 (In Canada, Aboriginal title is not given lesser status than other property interests, and evidence of title is admissible before the Crown's sovereignty.).
[22] See Michele McCarthy, *Illinois Law & Practice* (Thomson Reuters, 2021) ch 31A s 1 (WL); Nancy Saint-Paul, *Clearing Land Titles*, 3rd ed (Thomson Reuters, 2020) s 1:5 (WL) (the Torrens system was abolished in some states because "[t]he initial costs of registration undoubtedly deterred many owners from registering their property. More significantly, however, the decrees of registration were not conclusive of ownership" at fn 3); *American Jurisprudence Legal Forms*, 2nd ed (Thomson Reuters) vol 16 s 222:1 ("In the jurisdictions that have enacted Torrens laws, the system is voluntary and exists parallel with the recording system" at s 222:1); Larry Wertheim, *Minnesota Practice Series, Real Estate Law*, 2020 ed (Thomson Reuters, 2020) vol 25 s 3:1 (explains how the abstract or recording system records the documentary evidence of title ownership, and the Torrens system has a court adjudicate ownership and a certificate of registration with all future conveyance instruments being filed with the registrar of titles).
[23] See Thomas Cooley, *A Treatise on the Constitutional Limitations Which Rest upon The Legislative Power of the States of the American Union* (Boston: Little Brown & Co, 1868) at 525 ("eminent domain ... itself, it would seem, must pertain to [the states], rather than to the government of the nation; and such has been the decision of the courts" at 525). The federal government relies on state law for many legal questions, especially the scope of property. Erin Ryan, "Federalism and the Tug of War Within: Seeking Checks and Balance in the Interjurisdictional Gray Area" (2007) 66 Md L Rev 503 at 551 (Federal bankruptcy law requires state law interpretations on property).
[24] See William Ruger & Jason Sorens, "Alabama - #1" (2020), online: *Cato Institute* <https://www.freedominthe50states.org/land/alabama>; "Craft Your Personalized Ranking" (2020), online: *Cato Institute* <https://www.freedominthe50states.org/personalize> (personalize the *Freedom in the 50 States* criteria to "Compensation required for or economic assessment required before regulatory", "Eminent domain reform index", "Cumulative mentions of "land use" in state appellate court decisions", and "Wharton Residential Land Use Regulatory Index"); The Fraser Institute's Economic Freedom in North America measures property rights as equal throughout the United States; thus, a state-by-state comparison of property rights cannot be used with this dataset. See Dean Stansel, José Torra & Fred McMahon, "Economic Freedom of North America 2019" (2020), online: *Fraser Institute* <https://www.fraserinstitute.org/studies/economic-freedom-of-north-america-2019> (the most recent publication).
[25] See Uniform Law Commission, "Eminent Domain Code" (2020), online: *Uniform Law Commission* <https://www.uniformlaws.org/committees/community-home?CommunityKey=47ea00b2-8003-4116-9608-41434f0a5658>.
[26] See James Gwartney et al, *Economic Freedom of the World: 2019 Annual Report*, (Canada: Fraser Institute 2019) at 228, online (pdf): *Fraser Institute* <https://www.fraserinstitute.org/sites/default/files/economic-freedom-of-the-world-2019.pdf>.

[27] See Terry Miller, Anthony Kim & James Roberts, *2019 Index of Economic Freedom*, 25th ed (Washington DC: The Heritage Foundation 2019) at 3, 17.
[28] See Gwartney *supra* note 26 (The Cato Institute co-publishes the *Economic Freedom of the World* Report. See "Economic Freedom of the World" (2020) online: *Cato Institute* <https://www.cato.org/economic-freedom-world>.).
[29] See Sary Levy-Carciente, *International Property Rights Index 2018*, ed by Lorenzo Montanari (Washington DC: Property Rights Alliance, 2018) at 62, online (pdf): *Property Rights Alliance* <https://s3.amazonaws.com/ipri2018/IPRI2018_FullReport2.pdf> [Levy-Carciente, "2018"]; See Jhoner Perdomo & Sary Levy-Carciente, 5 Years of the World's Property Rights: Case Study (Washington DC: Property Rights Alliance, 2019) at 5, online (pdf): *Property Rights Alliance* <https://atr-ipri2017.s3.amazonaws.com/uploads/Case+Studies+2019/5+YEARS_newlayoutv2.pdf> (Although the Property Rights Index suggests the U.S. is gradually improving, the U.S. is actually making up for a collapse in its Property Rights Protections score from 8.1 out of 10 in 2008: the highest it was ever ranked. For perspective, Germany ranked as 9.6 out of 10 in 2008, outperforming the U.S. by 1.5 points. Satya Thallam, *International Property Rights Index: 2008 Report* (Washington DC: Property Rights Alliance, 2008) at 22, 24, online (pdf): *Property Rights Alliance* <https://s3.amazonaws.com/ipri2018/2008_full.pdf>).
[30] Gwartney supra note 26 at v (defining the cornerstones of economic freedom).
[31] Miller, *supra* note 27 at 8.
[32] See Miller, *supra* note 27 at 457–458; Gwartney supra note 26 at 227–229; Sary Levy-Carciente, *International Property Rights Index 2019*, ed by Lorenzo Montanari (Washington DC: Property Rights Alliance, 2019) at 7-10, 70, online (pdf): *Property Rights Alliance* <https://atr-ipri2017.s3.amazonaws.com/uploads/IPRI_2019_FullReport.pdf> [Levy-Carciente, "2019"].
[33] The Property Rights Alliance's *International property rights index* cites the World Economic Forum's *The Global Competitiveness Report 2017-2018* for determining property right protections, which ranks property rights as follows (1) Finland [6.6]; (2) Switzerland [6.5]; (3) Singapore [6.4]; (4) Luxembourg [6.3]; and (5) New Zealand [6.3]. Levy-Carciente, "2018", *supra* note 29 at 7. See also World Economic Forum, "Competitiveness Rankings, 1. Property rights" in *Global Competitiveness Report 2017-2018* (2019), online: *World Economic Forum* <http://reports.weforum.org/global-competitiveness-index-2017-2018/competitiveness-rankings/#series=GCI.A.01.01.01>.

The Cato Institute and Frasier Institute 2018 reports cite the World Economic Forum's, using 2016-2017 consolidated data, for determining property right protections in 2016. The ranking of property right protections are as follows, (1) Switzerland [6.5]; (2) Finland [6.5]; (3) Sweden [6.3]; (4) Luxembourg [6.3]; and (5) Singapore [6.3]. Ian Vásquez & Tanja Porčnik, *The Human Freedom Index 2018: A Global Measurement of Personal, Civil, and Economic Freedom*, (Washington DC: Cato Institute, the Fraser Institute, and the Friedrich Naumann Foundation for Freedom, 2018) at 9, 387; James Gwartney et al, *Economic Freedom of the World: 2018 Annual Report*, (Canada: Fraser Institute, 2018) at 1, 215, online (pdf): *Fraser Institute* <https://www.fraserinstitute.org/sites/default/files/economic-freedom-of-the-world-2018.pdf >; World Economic Forum, *Insight Report: The Global Competitiveness Report 2016 – 2017*, ed by Klaus Schwab (Geneva, CH: World Economic Forum, 2016) at 177, 243, 319, 331, 333, online (pdf): *World Economic Forum* <http://www3.weforum.org/docs/GCR2016-2017/05FullReport/TheGlobalCompetitivenessReport2016-2017_FINAL.pdf> ["Global Competitiveness 2016 – 2017 Report"].

The Heritage Foundation's *2019 Index of Economic Freedom* cites the World Economic Forum's *World Competitiveness Report*, World Bank's *Doing Business*, and Credendo Group's *Country Risk Assessment*. The Heritage Foundation property right rankings are as follows: (1) Singapore [97.4]; (2) New Zealand [95.0]; (3) Hong Kong [93.3]; (4) United Kingdom [92.3]; and (5) Finland [89.6]; (14) Switzerland [85.3]. However, Switzerland ranks No. 4 in overall Economic Freedom. See, Miller, *supra* note 27 at 18, 458.
[34] World Economic Forum, *The Global competitiveness Report 2019*, "Property Rights" (2020), online: *World Economic Forum* <http://reports.weforum.org/global-competitiveness-report-2019/competitiveness-rankings/#series=EOSQ051> (the U.S. ranks 25 for 2020); The Heritage Foundation, *2020 Index of Economic Freedom*, "Explore the Data" (2020), online: *The Heritage Foundation* <https://www.heritage.org/index/explore> (the U.S. ranks 25 after filtering and ordering the countries by Property Rights); Contra Levy-Carciente, "2019", *supra* note 32 at 19 (the U.S. ranks 4 in physical property rights; however, Singapore, New Zealand, and Switzerland outrank the U.S.)
[35] *Ibid*.

[36] See "Global Competitiveness 2016 – 2017 Report", *supra* note 33 at 63. Levy-Carciente, "2018", *supra* note 29 at 7; World Economic Forum, *Insight Report: The Global Competitive Report 2018*, ed by Klaus Schwab (Geneva, CH: World Economic Forum, 2018) at 364, online (pdf): *World Economic Forum* <http://www3.weforum.org/docs/GCR2018/05FullReport/TheGlobalCompetitivenessReport2018.pdf> ["Global Competitiveness Report 2018"];
[37] See Susan Jamieson, "Likert Scale" in *Encyclopædia Britannica* (2020), online: *Britannica* <https://www.britannica.com/topic/Likert-Scale> ("Likert scale, rating system, used in questionnaires, that is designed to measure people's attitudes, opinions, or perceptions. … A larger scale (e.g., seven categories) could offer more choices to respondents, but it has been suggested that people tend not to select the extreme categories in large rating scales, perhaps not wanting to appear extreme in their view."); Saul McLeod, "Liker Scale Defintion, Examples and Analysis" (2019), online: *Simple Psychology* <https://www.simplypsychology.org/likert-scale.html> ("Various kinds of rating scales have been developed to measure attitudes directly (i.e. the person knows their attitude is being studied). The most widely used is the Likert scale (1932). In its final form, the Likert scale is a five (or seven) point scale which is used to allow the individual to express how much they agree or disagree with a particular statement.")
[38] "Global Competitiveness Report 2018", *supra* note 36 at 634.
[39] *Ibid* at 623-624.
[40] See "Global Competitiveness Report 2019", *supra* note 1 at 633-634, online (pdf): *World Economic Forum* <http://www3.weforum.org/docs/WEF_TheGlobalCompetitivenessReport2019.pdf> [Global Competitiveness 2019].
[41] *Ibid* at 633.
[42] See Daniel H. Cole & Peter Z. Grossman, "Protecting Private Property with Constitutional Judicial Review: A Social Welfare Approach" (2009) 5:1 Rev of L & Economics 233 at 247–48. See e.g. Hannibal Travis, "The Cultural and Intellectual Property Interests of the Indigenous Peoples of Turkey and Iraq" (2009) 15 Tex Wesleyan L Rev 415 at 491–92 (expropriation of Jewish places of worship based on religion). See also Miller, *supra* note 3 at 10.
[43] See The World Bank, "Ease of Doing Business Ranking" (2019), online: *The World Bank* <https://www.doingbusiness.org/en/rankings>; "Global Competitiveness Report 2019", *supra* note 1 at 582.
[44] See US Const amend V
[45] See World Economic Forum, *The Global Competitiveness Report 2019*, "Executive Summary" (2019), online: *World Economic Forum* <http://reports.weforum.org/global-competitiveness-report-2019/executive-summary-2/>; World Economic Forum, *The Global Competitiveness Report 2018*, "Global Competitiveness Index 4.0" (2018), online: *World Economic Forum* <http://reports.weforum.org/global-competitiveness-report-2018/competitiveness-rankings/>; World Economic Forum, *The Global Competitiveness Report 2019*, "Global Competitiveness Index 4.0" (2019), online: *World Economic Forum* <http://reports.weforum.org/global-competitiveness-report-2019/competitiveness-rankings/>; James Gwartney et al, *Economic Freedom of the World: 2020 Annual Report* (Canada: Fraser Institute, 2020) at 9 <https://www.fraserinstitute.org/sites/default/files/economic-freedom-of-the-world-2020.pdf>; The Heritage Foundation, "Country Rankings" (2021), online: *2021 Index of Economic Freedom* <https://www.heritage.org/index/ranking> (2021 rankings report Singapore, Switzerland, and New Zealand as "free" economies and the United States is "mostly free").
[46] See Hugo Grotius, *Hugonis Grottii De jure belli ac pacis libri tres, in quibus jus naturae [et] gentium, itme juris publici praceipua explicantur*, Book III, translated by Francis Kelsey (London: Humphrey Milford, 1925) Ch XIX at 797, online: *Internet Archive* <https://archive.org/details/hugonisgrottiide02grotuoft/>; Susan Reynolds, *Before Eminent Domain: Toward a History of Expropriation of Land for the Common Good* (Chapel Hill, NC: The University of North Carolina Press, 2010) at 131 ("Because property thus came from society, society could take it away again, but only if it was needed for the common good that was the purpose of the contract and the formation of society" at 131)
[47] See Richard Epstein, Takings: Private Property and The Power of Eminent Domain (Cambridge, Mass: Harvard U Press, 1985) at 163 [Epstein, "Takings"]; Michael Salvas, "A Structural Approach to Judicial Takings", Note & Comment, (2012) 16 Lewis & Clark L Rev 1381 at 1400 (Locke's discussion of taking funds to manage the state applies to all property, not merely taxes). See also William Blackstone, *Commentaries on the Laws of England in Four Books* (Philadelphia: J B Lippincott Co, 1893) vol 1 at 138, online: *Online Library of Liberty* <https://oll.libertyfund.org/title/sharswood-commentaries-on-the-laws-of-england-in-four-books-vol-1> ("So great … is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community." At 138).

[48] See e.g. Robert Fleck & F Andrew Hanssen, "Repeated Adjustment of Delegated Powers and the History of Eminent Domain" (2010) 30 Int'l Rev L & Econ 99 at 100.
[49] See Susan Reynolds, *supra* note 46 at 86, 89, 92–93; *Bauman v Ross*, 167 US 548 at 574 (1897); *United States v Gettysburg Elec R Co*, 160 U.S. 668 at 681 (1896); Robert Cooter & Thomas Ulen, *Law and Economics*, 6th ed (USA: Addison-Wesley, 2012) at 82 (traditional principles of fairness would have the injurer pay to prevent harm to other legal interests, even if the most cost-efficient solution would require the injured to pay to mitigate the injurer's future harm).
[50] Although *gunboat diplomacy* applies to international demonstrations of military force, the similar idea applies to domestic demonstrations of power. The autocrat or monarchy has the absolute power to take land by force, but exercises discretion not to expropriate.
[51] See Richard Posner, *Economic Analysis of Law*, 3rd ed (USA: Little, Brown and Company, 1986) at 49.
[52] See Walter Block, *Property Rights: The Argument For Privatization* (Palgrave Macmillan, 2019) at 252–253; George Liebmann, "Land Readjustment for America: A Proposal for A Statute" (2000) 32 Urban Lawyer 1 at 2.
[53] See Epstein, "Takings", *supra* note 47 at 167.
[54] *Supra* note 51.
[55] See Christopher Serkin, "Response: Testing the Value of Eminent Domain" (2014) 89 Tulane L Rev 115 at 118; Posner, *supra* note 51 at 55.
[56] *Ibid*.
[57] *Ibid*; Ilya Somin, "Controlling the Grasping Hand: Economic Development Takings After Kelo" (2007) 15 Sup Ct Econ Rev 183 at 191ff (Part II) [Ilya Somin,"Controlling the Grasping Hand"]; Martin Gold & Lynne Sagalyn, "The Use and Abuse of Blight in Eminent Domain" (2011) 38 Fordham Urban LJ 1119 at 1132–43.
[58] Patricia Munch, "An Economic Analysis of Eminent Domain" (1976) 84 J Pol Econ 473 at 490; Daniel Kelly, "The 'Public Use' Requirement in Eminent Domain Law: A Rationale Based on Secret Purchases and Private Influence" (2006) 92 Cornell L Rev 1 at 18–41 (discussing other tactics to prevent the holdout problem); Ilya Somin,"Controlling the Grasping Hand", *supra* note 15 at 206–09.
[59] See Patricia Munch, *supra* at 480. See generally Lawrence Blume & Daniel Rubinfeld, "Compensation for Takings: An Economic Analysis" (1984) 72 Calif L Rev 569 at 588 at 624 (excluding regulatory takings from eminent domain remedies causes the taking to be inefficient).
[60] See John Bourdeau et al, Corpus Juris Secundum (Thomson Reuters, 2021) vol 29A s 2 (WL); Blackstone, *supra* note 47.
[61] See Bourdeau, *supra* s 2–3. See e.g. *Osborn v Hart*, 24 Wis 89 at 92 (1869).
[62] See e.g. *New Orleans (City of) v New Orleans Land Co*, 173 La 71, 136 So 91 at 92–93 (1931); *Bloodgood v Mohawk & Hudson R Co*, 18 Wend 9 at 60–61 (NY Ct App 1837) (opinion of Senator Tracy) (Testing for a public use instead of a common benefit or public interest).
[63] See Marisa Fegan, "Just Compensation Standards and Eminent Domain Injustices: An Underexamined Connection and Opportunity for Reform", Notes & Comment, (2007) 6 Conn Pub Interest LJ 269 at 275; *Armstrong v United States*, 364 US 40 at 49 (1960).
[64] See Marisa Fegan, *surpa* at 274–75; Ramin Dadasov, Carsten Hefeker & Oliver Lorz, "Natural Resource Extraction, Corruption, and Expropriation" (2017) 15:4 Review of World Economics/Weltwirtschaftliches Archiv 809 at 826 ("by controlling bureaucrats more intensively and thereby making corruption more ''expensive'', the government of the host country can push back corruption and increase investment and resource extraction. … policy measures to raise a countries' attractiveness for foreign investment, to improve property rights, or to reduce corruption should take this interdependence into account" At 826).
[65] 545 U.S. 469 (2005). This was not the first instance of the judiciary being lenient on the State exercising its eminent domain power (*Berman* in 1954 and *Midkiff* in 1984); however widespread uproar came from the *Kelo* case. See Patricia Salkin, *American Law of Zoning*, 5th ed (Thomson Reuters, 2020) vol 2 s 17:4 (WL).
[66] See *Kelo v. New London (City of), Conn*, 545 US 469 at 477 (2005) [*Kelo*].
[67] *Ibid* at 478.
[68] See *Bradley v Degnon Contracting Co*, 224 NY 60 at 72, 120 NE 89 at 93 (1918); *Edens v Columbia (City of)*, 228 S.C. 563 at 573, 91 SE (2d) 280 at 283 (1956) (quoting Bookhart v Central Elec Power Co-op, 219 SC 414, 65 SE (2d) 781 at 788); *Re Niagara Falls*, 108 NY 375, 15 NE 429 (1888)
[69] *Ibid* at 479–80; Megan James, "Checking the Box Is Not Enough: The Impact of Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC and Texas's Eminent Domain Reforms on the Common Carrier Application Process", Comment, (2013) 45 Tex Tech L Rev 959 at 982. Contra *Grubstein v Urban Renewal Agency of Tampa (City of)*,115 So (2d) 745 at 751 (Fla Sup Ct 1959) ("'public benefit' is not synonymous with 'public purpose', when it comes to spending the taxpayers' money or taking his property by eminent domain … It is abundantly clear that,

while the public might be incidentally benefited by the Project plan proposed … it was not reasonably necessary to condemn the plaintiff's property in order to correct the substandard conditions existing in the area" at 751).
[70] See *Re Goldstein v NY State Urban Dev Corp*, 921 NE (2d) 164 at 172 (NY Ct App 2009); *Puntenney v Iowa Utils Bd*, 928 NW (2d) 829 at 848 (Iowa Sup Ct 2019) cert. denied, 140 S Ct 1243, 206 L Ed 2d 240 (2020).
[71] See *Kelo*, supra note 66 at 485.
[72] *Ibid*.
[73] See Paul Coltoff et al, *New York Jurisprudence 2nd ed*, (Thompson Reuters, 2019) vol 51 s 74 (WL); See e.g. *Talley v Housing Authority of Columbus*, 279 Ga App 94 at 95-96, 630 SE (2d) 550 (Ga Ct App 2006).
[74] See *Berman v Parker*, 348 US 26 (1954).
[75] See Richard Epstein, "*Kelo v. City of New London* Ten Years Later" (2015), online: *National Review* <https://www.nationalreview.com/2015/06/kelo-eminent-domain-richard-epstein/>; Institute for Justice, "Kelo Eminent Domain" online: *Institute for Justice* <https://ij.org/case/kelo/>; Block, *supra* note 51 at 241.
[76] *Ibid*.
[77] See *Biernacki v Redevelopment Auth of City of Wilkes-Barre*, 32 Pa Cmwlth 537 at 539, 379 A (2d) 1366 at 1367 (Pa Commonw Ct 1977).
[78] *Kelo*, *surpa* note 66 at 483–84, 506 (majority opinion) (Thomas, J dissenting at 506). See e.g. *Poletown Neighborhood Council v Detroit (City of)*, 410 Mich 616 at 644, 304 NW (2d) 455 at 464 (1981) (Fitzgerald, J dissenting), overruled by Wayne (County of) v. Hathcock, 471 Mich 445, 684 NW (2d) 765 (2004).
[79] See Michael Rossenhouse, *American law Reports* (Thomson Reuters, 2007) vol 21 at 261 s 2; *Kelo*, 545 U.S. 469 at 501 (2005) (O'Connor, J concurrence); *Tal v Hogan*, 453 F3d 1244, 1257 (10th Cir. 2006) (applying *Kelo* and holding economic development as a public use).
[80] *Kelo*, *supra* note 66 at 475 (U.S.Conn.,2005)
[81] See Brian Blaesser & Alan Weinstein, *Federal Land Use Law & Litigation* (Thomson Reuters, 2020) s 3:28.
[82] See generally *Nebbia v New York (People of)*, 291 US 502 at 537 (1934).
[83] See Ilya Somin,"Controlling the Grasping Hand", *supra* note 57 at 270; Christina Sandefur, "The Property Ownerhsip Fairness Act: Protecting Private Property Rights" (9 February 2016), online *Goldwater Institute* <https://goldwaterinstitute.org/article/the-property-ownership-fairness-act-protecting-private-property-rights/>.
[84] See e.g. 315 Ill Comp Stat Ann 20/3-11, CO ST § 31-25-103(2).
[85] *Ibid*.
[86] Grubstein, *supra* note 69 at 748 (quote source). See also NY Gen Mun Law s 506 (McKinney); Tex Loc Gov't Code Ann s 374.015. See generally Ronald Chen, "Gallenthin v. Kaur: A Comparative Analysis of How the New Jersey and New York Courts Approach Judicial Review of the Exercise of Eminent Domain for Redevelopment" (2011) 38 Fordham Urban LJ 987 at 1016.
[87] See Douglas Randall & Douglas Franklin, *Massachusetts Practice Series TM: Municipal Law & Practice*, 5th ed (Thomson Reuters, 2020) s 32.2.
[88] See Ann Eisenberg, "Rural Blight" (2018) 13 Harv L & Pol'y Rev 187 at 201.
[89] See Christopher Brown, "Blinded by the Blight: A Search for A Workable Definition of "Blight" in Ohio", Comment, (2004) 73 U Cincinnati L Rev 207 at 223 (Maryland's former blight statue required metrics that the landowner could control, stopping the municipality from being the tiebreaking decision or final determiner); Jonathan Purver, American Law Reports (Thomson Reuters, 1972) vol 45 at 1096 s 3; *Birmingham (City of) v Tutwiler Drug Co*, 475 So (2d) 458 at 467 (Ala 1985) ("It is the condition of the entire redevelopment area as a whole, not the condition of the plaintiff's property, which determines whether redevelopment is warranted under the urban renewal and redevelopment law" at 468–69); *Norwood v Horney*, 2005-Ohio-2448, ¶ 28, 161 Ohio App 3d 316 at 326, 830 NE (2d) 381 at 388, rev'd, 2006-Ohio-3799, ¶ 28, 110 Ohio St 3d 353, 853 NE (2d) 1115 (the city's code designated areas as part of a renewal area when the landowner could not resolve the issue. An increased population density, faulty street arrangements, and inadequate community utilities qualified land as blight. at 326); *Grunwald v Community Development Authority of West Allis (City of)*, 202 Wis (2d) 471 at 485–86 (Ct. App. 1996) (Non-blight property is condemnable merely because it is located in an area that "impairs the sound growth of the city[.]" at 485).
[90] See e.g. *Berman v Parker*, *supra* note 74 at 34; Calif Health & Safety Code § 33321 (WL)
[91] See *Berman v Parker*, *supra* note 74 at 35.
[92] See *Apostle v. Seattle (City of)*, 70 Wash 2d 59 at 64, 422 P (2d) 289 at 292 (1966)
[93] Martin Gold & Lynne Sagalyn, *supra* note 57 at 1157 (states with a parcel-by-parcel blight condemnation regime include "Arizona, Georgia, Iowa, Kansas, Louisiana, Michigan, Missouri, Nevada, North Carolina, … Oregon, South Carolina, Virginia, West Virginia, Wisconsin, and Wyoming" at 1157) (citations omitted).

[94] See *Arnsperger v Crawford*, 101 Md 247, 61 A 413 at 415 (1905); *Borden v Trespalacios Rice & Irr Co*, 98 Tex 494 at 509 (1905), aff'd, 204 US 667 (1907).
[95] Dwight Merriam & Mary Ross, *Eminent Domain Use & Abuse: Kelo in Context* (American Bar Association, 2006) ch 12 (WL) ("Hours after the Kelo decision, the City of Freeport, Texas, condemned two small seafood companies--family-owned seafood companies--to give to a private developer to build an $8 million dollar private boat marina.") ("[Most eminent domain cases] involve simply the government wanting to get more taxes for their town and thinking that new development will bring in those taxes and that they're willing to replace the businesses or the residents that are there now in order to bring that about.")
[96] See Dale Whitman, "Eminent Domain Reform in Missouri: A Legislative Memoir" (2006) 71 Mo L Rev 721 at 736 (The landlord refused to demolish and rebuild an expanded commercial property. The city expropriated the property for the expansion and giving title to the commercial tenants.). See also George Leef, "We're Still Learning The Lessons Of 'Kelo' Ten Years Later" (9 July 2015), online: *Forbes Media LLC* <https://www.forbes.com/sites/georgeleef/2015/07/09/were-still-learning-the-lessons-of-kelo-ten-years-later/#6a11b17633ec>. See e.g. Stanley Leasure & Carol Miller, "Eminent Domain-Missouri's Response to Kelo" (2007) 63 J Missouri Bar 178 at 185 (WL) ("The first consulting firm hired by the city did not find evidence of blight in the working-class neighborhood, so the city hired a second firm to search for evidence that would satisfy the criteria for blight under the city's TIF ordinance" at 185).
[97] See John Gillespie, "Transforming Land-Taking Disputes in Socialist Asia: Engaging an Authoritarian State" (2017) 39:3 L & Policy 280 at 295.
[98] See Ilya Somin, "The Judicial Reaction to Kelo" (2011) 4 Alb Gov't L Rev 1 at 5–6; Jeffrey Post & Melissa Baer, "Limits of Urban Redevelopment? Kelo, Walser, and Condemnation in Minnesota" (2005) 62-AUG Bench & Bar of Minnesota 14 at 15.
[99] See John Bourdeau et al, *American Jurisprudence*, 2nd ed (Thomson Reuters 2021) vol 26 s 43; Francis Amendola et al, Corpus Juris Secundum (Thomson Reuters, 2021) vol 16D s 2069.
[100] See e.g. Michael Greibrok, "Grassroots Response to Kelo Decision" (23 June 2015), online: *Freedom Works* <https://www.freedomworks.org/content/grassroots-response-kelo-decision>; See also Ilya Somin, "Justice Stevens Admits Error in the Kelo Case—but Also Doubles Down on the Bottom Line" (8 June 2019), online: *Reason Foundation* <https://reason.com/2019/06/08/justice-stevens-admits-error-in-the-kelo-case-but-also-doubles-down-on-the-bottom-line/>.
[101] See Ilya Somin, "Controlling the Grasping Hand", *supra* note 57 at 267. See also Ilya Somin, "Lessons From a Little Pink House, 10 Years Later" (22 June 2015), online: *Cato Institute* <https://www.cato.org/publications/commentary/lessons-little-pink-house-10-years-later>.
[102] See *Satterfield v Crown Cork & Seal Co*, 268 SW (3d) 190 at 202 (Tex Ct App 2008) ("While state constitutions cannot subtract from the rights guaranteed by the United States Constitution, state constitutions can, and often do, provide additional rights for their citizens" at 202); Brett Legner, "Interpreting the Illinois Constitution: Understanding the Rights Afforded by A Modern Charter" (2017) 48 Loy U Chicago LJ 851 at 853 (WL) ("One way state constitutions may provide greater individual protections is that they often contain more enumerated protections than the Federal Constitution" at 853); Barbara Van Arsdale et al, *American Jurisprudence,* 2nd ed (Thomson Reuters, 2021) vol 16A s 228; US Const amend X; *Alden v Maine*, 527 US 706 at 739, 119 S Ct 2240 (1999) (quoting *Nevada v Hall*, 440 US 410 at 425, 99 S Ct 1182 at 1190 (1979), overruled by *Franchise Tax Bd. of California v Hyatt*, 139 S Ct 1485, 203 L Ed (2d) 768 (2019)); See also Elizabeth Anne Reese, "Or to the People: Popular Sovereignty and the Power to Choose A Government" (2018) 39 Cardozo L Rev 2051 at 2076.
[103] See Thomas Van Flein, "The Baker Doctrine and the New Federalism: Developing Independent Constitutional Principles Under the Alaska Constitution" (2004) 21 Alaska L Rev 227 at 229–30.
[104] *Washington v Gunwall*, 106 Wash (2d) 54 at 58 (1986); *Pennsylvania v Edmunds*, 526 Pa 374 at 390 (1991) ("1) text of the Pennsylvania constitutional provision; 2) history of the provision, including Pennsylvania case-law; 3) related case-law from other states; 4) policy considerations, including unique issues of state and local concern, and applicability within modern Pennsylvania jurisprudence" at 895); *Iowa v. Gaskins*, 866 NW (2d) 1 at 24 (Iowa Sup Ct 2015) (the list of considerations should not be substantive; otherwise, the state may never conceive its own independent constitutional analysis, meaning "when the United States Supreme Court changes course, the state court must follow unless the requirements of a thread-the-needle checklist have been met" at 24).
[105] Francis Amendola et al, *supra* note 99.
[106] André LeDuc, "Twilight of the Idols: Philosophy and the Constitutional Law of Takings" (2019) 10 Ala Civil Rights & Civil Liberties L Rev 201 at 202–03; Lynn Blais, "The Total Takings Myth" (2017) 86 Fordham L Rev 47 at 65, 88.

[107] See *Calder v Bull*, 3 US 386 at 388 (1798); *Omaha (City of) v Kramer*, 25 Neb 489 (Neb Sup Ct 1889) ("It is not within the scope of the authority of the law-making department of the government to take the property of A. and give it to B., even if B. has the right to condemn property for public use. This being so, it is equally beyond the power of such department to confer the right on B. to damage or destroy the property of A. without making compensation therefor. The right of the legislature to authorize the taking of private property for public use is based on the condition that an equivalent in value be paid to the owner. … In the one case, all the property is taken, while in the other it is taken only to the extent that it is diminished in value; and in either case the owner is entitled to be compensated for his loss" at 296)

[108] See *R (Federation of Tour Operations) v HM Treasury,* [2008] EWCA Civ 752, [2008] UKHRR 1250 at paras 20–21 (property rights are downplayed in the European Convention of Human Rights); *A H Properties Ltd v Tabley Estates Ltd*, [1993] HC Hamilton CP142/92 at 36 (HC) ("… property rights are very strong rights. They rank, in the hierarchy of rights recognised by law, just below absolute constitutional rights. In more colloquial terms, on a scale of one to ten, constitutional rights are a ten, property rights are a nine" at 36).

[109] See *Valentine v Lamont*, 13 NJ 569 at 575, 100 A (2d) 668 at 670–71 (NJ Sup Ct 1953) (citing 2 Kent, Commentaries (14th ed) and Cooley, Constitutional Limitations (8th ed)); *Kohl v United States*, 91 US 367 at 372; 23 L Ed 449 (1875) ("if the right of eminent domain exists in the Federal government, it is a right which may be exercised within the States, so far as is necessary to the enjoyment of the powers conferred upon it by the Constitution." at 372). See generally Susan Reynolds, Susan Reynolds, *supra* note 46 at 2–5, 95–96. (recommended book for history and context of eminent domain generally).

[110] See *Valentine v Lamont*, 13 NJ 569 at 575, 100 A (2d) 668 at 670–71 (NJ Sup Ct 1953) (citing 2 Kent, Commentaries (14th ed) and Cooley, Constitutional Limitations (8th ed)); *Kohl v United States*, 91 US 367 at 372 (1875) ("if the right of eminent domain exists in the Federal government, it is a right which may be exercised within the States, so far as is necessary to the enjoyment of the powers conferred upon it by the Constitution." at 372). See generally Susan Reynolds, *supra* note 46 at 2–5, 95–96. (recommended book for history and context of eminent domain generally).

[111] See Ronald Rotunda & John Nowak, Treatise on Constitutional Law-Substance & Procedure (Thomson Reuters, 2020) at s 15.11 (summarizing the thoughts of Hugo Grotius, the founder of eminent domain.); See, Grotius, *supra* 46 at C 20 VII 1 (1625).

[112] See Andrew Gold, "Regulatory Takings and Original Intent: The Direct, Physical Takings Thesis 'Goes Too Far'" (1999) 49 Am UL Rev 181 at 223–24, 228.

[113] *Ibid* at 224–25. See also *Stowell v Flagg*, 11 Mass 364 at 368 (Mass Sup Ct 1814) (Massachusetts upheld their Mill Act under Massachusetts General Laws Chapter 253); *Ryerson v Brown*, 35 Mich 333 (1877) (Michigan overruled their Mill Act).

[114] See David Schultz, "Political Theory and Legal History: Conflicting Depictions of Property in the American Political Founding" (1993) 37 Am J Legal History 464 at 491–94. See also David Thomas, "Why the Public Plundering of Private Property Rights Is Still A Very Bad Idea" (2006) 41 Real Property Probate & Trust J 25 at 46 (America was already starting to create their own property law distinct from the English common law).

[115] See Michael Zizka et al, *State and Local Government Land Use Liability* (Thomson Reuters, 2021) s 12:3 (Before the 14th Amendment was ratified, the Takings Clause only applied to takings by the federal government, which was rare because they relied on the states to expropriate).

[116] See *Tennessee Gas Pipeline Co, LLC v Permanent Easement for 7.053 Acres, Permanent Overlay Easement for 1.709 Acres & Temporary Easements for 8.551 Acres in Milford & Westfall Townships, Pike County, Pennsylvania, Tax Parcel Numbers*, 931 F (3d) 237 at 245 (3d Cir. 2019), as amended (July 25, 2019); See e.g. *City of Tupelo v O'Callaghan*, 208 So (3d) 556 at 563 (Miss Sup Ct 2017).

[117] See Julius L Sackman et al, *Nichols on Eminent Domain*, rev 3rd ed , vol 2A (Matthew Bender & Company, Inc, 2008) § 7.01 [1]; US Const art V (The Taking's Clause).

[118] See US Const art V (The Due Process Clause).

[119] See Dana Berliner, John Ross, & Christina Walsh, "50 States Report Card: Tracking Eminent Domain Reform Legislation since Kelo" (August 2007), online: *Castle Coalition* <http://castlecoalition.org/50-state-report-card>; William Ruger & Jason Sorens, "Freedom in the 50 states: Ranking states by the policies that shape personal and economic freedom" *Eminent Domain Reform Index* (2018), online: *Freedom in the 50 States* <https://www.freedominthe50states.org/custom/eminent-domain-reform-index>; See, e.g., Alaska Stat § 09.55.240 (d); Fla Const art X, s 6; Kan Stat Ann s 26-501a; Me Rev Stat Ann tit 1, s 816; Mich Const art X, § 2; 26 Pa Cons Stat § 204; La Const art I, § 4 (B)(1).

[120] See Ilya Somin, "The Limits of Backlash: Assessing the Political Response to Kelo" (2009) 93 Minn L Rev 2100 at 2146 [Somin, "Limits of Backlash"] (e.g., for South Carolina, "The new constitutional amendment adds nothing

to this the case law and leaves open the possibility that future court decisions will be able to reverse it in the absence of a clear textual statement in the state constitution to the contrary.") See aslo Michael Pollack, "Taking Data" (2019) 86:1 U Chicago L Rev 77 at 129.
[121] Leasure, *supra* note 96 at 182; Kristyna Ryan, "Private Property, Public Benefit Economic Redevelopment and the Power of Eminent Domain" (2005) 19 Young Lawyer Journal, CBA Rec 50 at 51.
[122] See Leasure, *supra* note 96 at 184.
[123] See *Missouri Pacific Railway Co v Nebraska*, 164 US 403 at 416–17 (1896); *Cole v La Grange (City of)*, 113 US 1 at 7–8 (1885); *Thompson v Consol Gas Utilities Corp*, 300 US 55 at 78–80 (1937); *Madisonville Traction Co v St Bernard Mining Co*, 196 US 239 at 251–252, (1905).
[124] See *Kelo*, *supra* note 66 at 477 (citing *Hawaii Housing Authoirty v Midkiff*, 467 US 229 at 245, 104 S Ct 2321 (1984)) ("[a] purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void" at 245).
[125] See *Kelo*, *supra* note 66 at 478.
[126] See *Kelo*, supra note 66 at 501(J. O'Connor concurring). See e.g. *Norwood v Horney*, 110 Ohio St (3d) 353 at 383, 853 NE (2d) 1115 at 1145 (2006) (the Ohio Supreme Court rejects the *Kelo* courts interpretation of a private-to-private taking justifying state actors to expropriate land).
[127] See *Kelo*, *supra* note 66 at 485.
[128] See *Kelo*, *supra* note 66 at 493.
[129] See Nick Dranias, "Eminent Domain Abuse in Minnesota" (2005) 62-AUG Bench & Bar of Minnesota 19 at 22.
[130] See James Kushner, *Subdivision Law and Growth Management*, 2d ed (Thomson Reuters, 2020) vol 1 s 6:35
[131] See Wesley Newcomb Hohfeld, "Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1916-1917) 26:8 Yale LJ 710 at 746–47.
[132] *Ibid*.
[133] See Jennifer Kruckeberg, "Can Government Buy Everything?: The Takings Clause and the Erosion of the "Public Use" Requirement", Note, (2002) 87 Minn L Rev 543 at 551; *Kelo*, *supra* note 66 at 487-88, 490 (Kennedy, J concurring) (stating the rational basis test has been applied and no heightened standard of review needs to be developed). *Contra* e.g. *Lansing (City of) v Edward Rose Realty, Inc*, 192 Mich App 551 at 554, 481 NW (2d) 795 at 797 (1992), aff'd, 442 Mich 626, 502 NW (2d) 638 (1993) (Michigan courts investigate what interest, public or private, is predominantly being advanced.)
[134] See Dranias, *supra* note 129 at 19-21.
[135] See *Berman v Parker*, *supra* note 74 at 32–33; *Wayne (County of) v Hathcock*, 471 Mich 445 at 475–76, 684 NW (2d) 765 at 783 (Mich Sup Ct 2004); Jerome Pesick & Ronald Reynolds, "The Availability of Eminent Domain for the Detroit Works Project" (2013) 40 Michigan Real Property Rev 63 at 65.
[136] See *Re Minneapolis Community Development Agency (MCDA), of Certain Lands in City of Minneapolis Situated in Development District No. 57, S Nicollet Mall*, 582 NW (2d) 596 at 602 & fn 4 (Minn App CT 1998).
[137] See Daniel Orlaskey, "The Robin Hood Antithesis - Robbing from the Poor to Give to the Rich: How Eminent Domain Is Used to Take Property in Violation of the Fifth Amendment", Comment, (2006) 6 U Md L Race, Religion, Gender & Class 515 at 530.
[138] See Bailey K. Schreiber, "Property Law-Strong Armed at Arm's Length: The Role of Comparable Easements in Condemnation Proceedings Under Wyoming's Amended Eminent Domain Laws; Barlow Ranch, Lp v. Greencore Pipeline Co., 2013 Wy 34, 301 P.3d 75 (Wyo, 2013)", Case Note, (2014) 14 Wyo L Rev 135 at 141.
[139] *Ibid* at 142 (citing *Coronado Oil Co v Grieves*, 642 P (2d) 423, 443 (Wyo Sup Ct 1982)) (citations omitted).
[140] See *Coronado Oil Co v Grieves*, 642 P (2d) 423 at 434, 436, 438-39, 443 (Wyo Sup Ct 1982) superseded by statute in *Barlow Ranch, Ltd. P'ship v Greencore Pipeline Co LLC*, 2013 WY 34 at ¶ 59, 301 P (3d) 75 at 94–95 (Wyo Sup Ct 2013).
[141] See *Hawaii Housing Authority v Midkiff*, 467 US 229 at 241–42, 104 S Ct 2321 at 2330 (1984) [*Midkiff*].
[142] *Ibid* at 233.
[143] *Ibid* at 232.
[144] *Ibid*. See generally George Skouras, *Takings Law and the Supreme Court: Judicial Oversight of the Regulatory State's Acquisition, Use, and Control of Private Property* ed by David A. Schultz (Peter Lang Publishing, 1998) at 58.
[145] See e.g. *Ibid*.
[146] See *Midkiff*, *supra* note 141 at 241–42.
[147] See Rotunda, *supra* note 111 s 15.13.
[148] See *Midkiff*, *supra* note 141 at 243.

[149] See 43 USC s 1713(f) (Government land is sold by competitive bidding; however, the Secretary of the Interior can find "it necessary and proper in order (1) to assure equitable distribution among purchasers of lands, or (2) to recognize equitable considerations or public policies, including but not limited to, a preference to users, he may sell those lands with modified competitive bidding or without competitive bidding"). See also US Const art IV, § 3, cl 2 (congressional power to dispose of federal public land).
[150] See Sam Khater, Len Kiefer & Venkataramana Yanamandra, "The Housing Supply Shortage: State of the States" (27 February 2020), online: *Freddie Mac* <http://www.freddiemac.com/research/insight/20200227-the-housing-supply-shortage.page>
[151] Chris Arnold, "'We Need To Build More Homes': Prices Soar Amid Housing Shortage", *NPR* (19 November 2020), online: *NPR* <https://www.npr.org/2020/11/19/936642973/we-need-to-build-more-homes-prices-soar-amid-housing-shortage>. See also The Council of Economic Advisers, "The State of Homelessnes in America" (September 2019), online (pdf): *White House* <https://www.whitehouse.gov/wp-content/uploads/2019/09/The-State-of-Homelessness-in-America.pdf>
[152] See *Midkiff*, *supra* note 141 at 243.
[153] See Epstein, "Takings", *supra* note 47 at 181.
[154] See e.g. *Ibid* at 242–44. See also Patricia Askew, "Take It or Leave It: Eminent Domain for Economic Development-Statutes, Ordinances, & Politics, Oh My!", Notes and Comments, (2006) 12 Tex Wesleyan L Rev 523 at 529; Thomas Merrill, "The Economics of Public Use" (1986) 72 Cornell L Rev 61 at 114 [Merrill, "Economics of Public Use"]; Kristi Burkard, "No More Government Theft of Property! A Call to Return to A Heightened Standard of Review After the United States Supreme Court Decision in Kelo v. City of New London" (2005) 27 Hamline J Pub L & Pol'y 115 at 137.
[155] See Merrill, "Economics of Public Use", *supra* note 154 at 110; *Souza v Estate of Bishop*, 799 F (2d) 1327, 1331 (9th Cir 1986) aff'd 821 F (2d) 1332 at 1336–37 (9th Cir. 1987) (holding a Hawaii landlord did not violate antitrust laws or create an unlawful monopoly); *Midkiff*, *supra* note 141 at 233 (Reforming tax laws could have encouraged the oligopoly to sell their land voluntarily.)
[156] See Jenny Schuetz, "To improve housing affordability, we need better alignment of zoning, taxes, and subsidies" (7 January 2020), online: *Policy 2020 Brookings* <https://www.brookings.edu/policy2020/bigideas/to-improve-housing-affordability-we-need-better-alignment-of-zoning-taxes-and-subsidies/>; *Regus v Baldwin Park (City of)*, 70 Cal App 3d 968 at 980, 139 Cal Rptr 196 at 203 (Calif Ct App 1977) ("blight in the context of this case can only be found in the 'inability of private enterprise to redevelop the area'" at 203) (citation omitted); Vanessa Calder, *Zoning, Land-Use Planning, and Housing Affordability*, (18 October 2017), online: *Cato Institute* <https://www.cato.org/publications/policy-analysis/zoning-land-use-planning-housing-affordability> ("The academic research on property regulation indicates that increased regulation is associated with a decline in supply, affordability, and growth.")
[157] See *Midkiff*, *supra* note 141 at 242 (quoting *Western & Southern Life Insurance Co v State Board of Equalization*, 451 US 648 at 671–672, 101 S Ct 2070 at 2084–2085 (1981))
[158] See Vanessa Bovo, "Keeping the Public in the Public Use Requirement: Acquisition of Land by Eminent Domain for New Sports Stadiums Should Require More Than Hypothetical Jobs and Tax Revenues to Meet the Public Use Requirement", Comment, (2006) 16 Seton Hall J Sports & Ent L 289 at 310; Richard Buck, "Thou Art Condemned: How New Jersey Courts Are Sacrificing Private Landowners on the Altar of Eminent Domain", Note, (2005) 2 Rutgers J L & Urban Policy 330 (2005) (discussing New Jersey's Eminent Domain Act).
[159] See David Schwed, "Pretextual Takings and Exclusionary Zoning: Different Means to the Same Parochial End" (2011) 2 Ariz J Enviormental L & Policy 53 at 62–63; Burkard, *supra* note 154 at 118-20, 137–38.
[160] See Mark Rosen, "When Are Constitutional Rights Non-Absolute? Mccutcheon, Conflicts, and the Sufficiency Question" (Paper delivered at The Contemporary First Amendment: Freedom of Speech, Press, and Assembly Symposium), (2015) 56 Wm & Mary L Rev 1535 at 1540. Michael S. Greve, "Property Rights at the Bicentennial: Course Correction or Constitutional Revolution?" (1991) 25 Beverly Hills B. Ass'n J. 114 at 115 (WL); Struart Banner, *American Property: A History of How, Why and What We Own* (Harvard University Press, 2011) at 2.
[161] See *Property Rights, Economics and the Environment*, vol 5 ed by Michael D Kaplowitz (Stamford, CT: Routledge, 2004) at 31; Ronald D Rotunda & John E Nowak, *Treatise on Constitutional Law – Substance & Procedure*, 5th ed (Thomson Reuters, 2019) s 15.11 (WL). Roger Pilon, "Cato Handbook for Policymakers: 16. Property Rights and the Constitution", online: *Cato Institute* <https://www.cato.org/cato-handbook-policymakers/cato-handbook-policy-makers-8th-edition-2017/property-rights-constitution>.
[162] See Carol Rose, "Property As the Keystone Right?" (1996) 71 Notre Dame L Rev 329 at 332.

[163] See James Madison, "Property", *The National Gazette* (27 March 1792), online: *National Archives: Founders Online* <https://founders.archives.gov/documents/Madison/01-14-02-0238> ("In a word, as a man is said to have a right to his property, he may be equally said to have a property in his rights").
[164] See Richard Pildes, "Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism" (1998) 27 J Legal Stud 725 at 731.
[165] See Frederick Schauer, "A Comment on the Structure of Rights", Comment, (1993) 27 Ga L Rev 415 at 429–30.
[166] See *Semple v Griswold*, 934 F (3d) 1134 at 1145 n 1 (10th Cir 2019) (Colorado Constitution was purposefully made difficult to amend); Richard Albert, "American Exceptionalism in Constitutional Amendment" (2016) 69 Ark L Rev 217 at 222–23 (*Contra* e.g. New Zealand Constitution is easy to amend); Adam Morse, "Second-Class Citizenship: The Tension Between the Supremacy of the People and Minority Rights" (2010) 43 J Marshall L Rev 963 at 998–99.
[167] See *Williams v Pryor*, 240 F (3d) 944 at 947–48 (11th Cir 2001); *Florida v Robinson*, 873 So (2d) 1205 at 1214 (Fla Sup Ct 2004); Contra, Switzerland's judiciary cannot question the constitutionality of the federal code.
[168] See Alan Chen, "Rosy Pictures and Renegade Officials: The Slow Death of Monroe v. Pape" (Article delivered at The 2009-2010 Edward A. Smith/Bryan Cave Lecture and Symposium, 2010) 78 UMKC L Rev 889 at 891.
[169] See generally H Ronald Welsh, "European Economic Community Law Versus United Kingdom Law: A Doctrinal Dilemma", Comment, (1975) 53 Tex L Rev 1032 at 1034–1037; Ittai Bar-Siman-Tov, "Legislative Supremacy in the United States?: Rethinking the 'Enrolled Bill' Doctrine" (2009) 97 Geo LJ 323 at 375, 380. See e.g. *Munn v Illinois*, 94 US 113 at 134, 24 L Ed 77 (1876).
[170] See Sing Const art 4 (rev 2016); US Const Art VI, para 2; *Marbury v Madison*, 5 US 137 at 178 (1803). Joshua Braver, "Exporting U.S. Counter-Interpretation: Redeeming Constitutional Supremacy in the U.K." (2016) 47 Geo. J. Int'l L. 867 at 872.
[171] See Rosen, *supra* note 160 at 1574.
[172] See George Blum et al, *American Jurisprudence*, 2nd ed (Thomson Reuters, 2020), vol 16(A) s 400; Laurence Tribe, "Jurisdictional Gerrymandering: Zoning Disfavored Rights out of the Federal Courts", Comment, (1981) 16 Harv CR-CLL Rev 129 at 139–145.
[173] See Mark Tunick, "Constitutional Protections of Private Property: Decoupling the Takings and Due Process Clauses" (2001) 3 U Pa J Const L 885 at 887.
[174] See *Lingle v Chevron USA Inc*, 544 US 528 at 537–38 (2005).
[175] See *Horne v Dep't of Agriculture*, 135 S Ct 2419 at 2427–28 (2015).
[176] See Rotunda, *supra* note 111.
[177] See *Sansotta v Nags Head (Town of)*, 724 F (3d) 533 at 544 (4th Cir 2013); *Rex Realty Co v Cedar Rapids*, 322 F (3d) 526 at 528 (8th Cir 2003).
[178] See *Re Brooklyn (City of)*, 143 N.Y. 596 at 617 (NY Ct App 1894), aff'd sub nom. *Long Island Water-Supply Co v Brooklyn (City of)*, 166 US 685 (1897).
[179] Julian Juergensmeyer et al, *Land Use Planning and Development Regulation Law*, 3rd ed (Thomson Reuters, 2021) s 16:4; "The Public Use Limitation on Eminent Domain: An Advance Requiem" (1949) 58 Yale LJ 599 at 613–14.
[180] See *Chicago B & Q R Co v Chicago*, 166 US 226 at 238 (1897); *New Jersey Sch Const Corp v Lopez*, 412 NJ Super 298 at 310–11 (NJ App Div 2010); *Gackstetter v Alaska*, 618 P (2d) 564 at 566 (Alaska Sup Ct 1980) (quoting *Ketchikan Cold Storage Co v State*, 491 P (2d) 143 at 150 (Alaska Sup Ct 1971)).
[181] See *Monongahela Nav Co v United States*, 148 US 312 at 325–26, 337 (1893) (Tradition); Mark Hearne, II, Steven Haskins & Meghan Largent, "The Fifth Amendment Requires the Government to Pay an Owner Interest Equal to What the Owner Could Have Earned Had the Government Paid the Owner the Fair-Market Value of Their Property on the Date the Government Took the Owner's Property" (2012) 1 Brigham-Kanner Property Rights Conference J 3 at p 35–37.
[182] See e.g. *United States v Fuller*, 409 U.S. 488 at 490 (1973); *United States v Virginia Elec & Power Co*, 365 U.S. 624 at 633 (1961).
[183] See *Berman v Parker*, *supra* note 74 at 36.
[184] See *United States v Commodities Trading Corp*, 339 US 121 at 123 (1950); Clynn Lunney, Jr., "Compensation for Takings: How Much Is Just?" (1993) 42 Catholic UL Rev 721 at 729–30.
[185] See *Abrams v West Virginia Racing Comm'n*, 164 W Va 315 at 318, 263 SE (2d) 103 at 106 (West Virgina Sup Ct 1980) (citing *Jackson v Virginia*, 443 US 307; 99 S Ct 2781 (1979)) ("A resolution by a state court of a federal constitutional claim is not binding on the federal courts" at 318). See also *Pue v Sillas*, 632 F (2d) 74 at 81 (9th Cir 1980) (federal courts will abstain from answering unsettled state constitutional matters even if the state constitution mirrors the federal constitution).

[186] See *Webb's Fabulous Pharmacies, Inc v Beckwith*, 449 US 155 at 160 (1980) (the federal constitutional protection apply to the states through the federal constitution's Fourteenth Amendment).
[187] See *E Enterprises v Apfel*, 524 US 498 at 522–23 (1998). See also *Armstrong v United States*, 364 US 40 at 49 (1960).
[188] *Ibid*.
[189] See *Tahoe-Sierra Preservation Council, Inc v Tahoe Regional Planning Agency*, 535 US 302 at 302; *Yee v Escondido (City of), Calif*, 503 US 519 at 522–23 (1992); Community Redevelopment Agency v. Abrams, 15 Cal (3d) 813, 126 Cal Rptr 473 (Calif Sup Ct 1975); *Housing Authority of City of East St. Louis v Kosydor*, 17 Ill (2d) 602 (1959); *AA Profiles, Inc v Fort Lauderdale (City of)*, 253 F (3d) 576 at 582–84 (11th Cir. 2001) (One business lost its economic value from the property from a permanent rezoning, and the landowner-business person was entitled to compensation for the diminution in value. Here, all use was lost all use at the time of the taking).
[190] See *First English Evangelical Lutheran Church of Glendale v. Los Angeles Cty, Calif*, 482 US 304 at 318–19 (1987) [*First English*]; *Yuba Nat Res, Inc v United States*, 904 F (2d) 1577, 1580 (Fed Cir Ct 1990). *Contra United States v Cent. Eureka Mining Co*, 357 US 155 at 168 (1958) (the government forcing all economic activity on the property during wartime did not constitute a compensable temporary taking).
[191] See *Wheeler v Pleasant Grove (City of)*, 833 F (2d) 267 at 271 (11th Cir. 1987).
[192] *Ibid* ("market rate return computed over the period of the temporary taking on the difference between the property's fair market value without the regulatory restriction and its fair market value with the restriction."); *Yuba Nat Res, Inc*, *supra* note 190 at 1581 (Fed Cir Ct 1990) (Fair rental value); *First English*, *supra* note 190 at 328.
[193] See *Williamson County Reg'l Planning Comm'n v Hamilton Bank of Johnson City*, 473 US 172 at 195 (1985), overruled by *Knick v. Scott, Pennsylvania (Twp of)*, 139 S Ct 2162, 204 L Ed (2d) 558 (2019).
[194] See *Front Royal & Warren County Indus Park Corp v Town of Front Royal*, *Va*, 135 F (3d) 275 at 283–84 (4th Cir 1998).
[195] *Ibid*; See Edward Cooper, *Federal Practice and Procedure (Wright & Miller)*, 3rd ed (2019) vol 18 s 4402.
[196] See *Knick v Scott, Pennsylvania (Twp of)*, 139 S Ct 2162 at 2167–68 (2019). *Joshua v United States*, 17 F (3d) 378 at 380 (Fed Cir.1994) (The landowner should be warned that the Federal District Court decisions cannot be reviewed before the Court of Federal Claims; thus, a separate cause under a different statue may be involved to raise a claim in Federal District Court and the Court of Federal Claims.). 42 USC s 1983 (the civil action against a state action applies to violation of the Federal Constitution's Fifth Amendment).
[197] See *State Colleges v Roth*, 408 US 564 at 572 (1972); *Kelo*, *supra* note 66 at 490–91 (Kennedy, J concurring) (applying a lower judicial test instead of a strict scrutiny test for other fundamental constitutional liberties).
[198] See Ronald Krotoszynski, Jr., "Fundamental Property Rights" (1997) 85 Geo LJ 555 at 557. See e.g. *Berman v Parker*, *supra* note 74 at 33–34.
[199] See *Gentry v Lee's Summit, Missouri (City of)*, 10 F (3d) 1340 at 1343 (8th Cir 1993).
[200] *Ibid*.
[201] See *W Farms Assocs v State Traffic Comm'n of Conn*, 951 F (2d) 469 at 472 (2d Cir 1991).
[202] See *Fusco v Connecticut*, 815 F (2d) 201 at 205 (2d Cir. 1987) (discussing *BAM Historic District Association v Koch*, 723 F (2d) 233 at 236–37 (2d Cir.1983)). See also *Fruman v Detroit (City of)*, 1 F Supp (2d) 665 at 672–73 (ED Mich 1998) (Inadequate notice did not allow for post-deprivation remedies).
[203] See D Zachary Hudson, "Eminent Domain Due Process" (2010) 119 Yale LJ 1280 at 1291–92 (discussing 920 A (2d) 1061 (Md Ct App 2007); *Norfolk & WRR Co v Sharp*, 395 SE (2d) 527 at 529 (West Virginia Sup Ct 1990)).
[204] See *Goss v Lopez*, 419 US 565 at 586 (1975).
[205] See *Truax v Corrigan*, 257 US 312 at 329–30 (1921).
[206] See La Const art I, § 4(B)(1), (3).
[207] See *New Orleans Redevelopment Auth v Johnson*, 16 So (3d) 569 at 583 (La App 4 Cir. 2009); N*ew Orleans Redevelopment Auth v Burgess*, 16 So (3d) 569 at 582 (La App 4 Cir 2009), writ denied, 18 So. 3d 65 (La Sup Ct 9/23/09).
[208] See La Const art I, § 5.
[209] See Mich Const art X, § 2.
[210] See Va Const art I, § 11.
[211] See Mont Const art II, § 29; *Montana Department of Highways v Standley Bros*, 215 Mont 475 (1985); *Bozeman Parking Comm'n v First Trust Co,* 190 Mont 107 (1980). See also John Bourdeau et al, *American Jurisprudence*, 2nd ed (2021) vol 27 s 622 (For some jurisdictions, "when a landowner retains an expert witnesses to assist him or her in obtaining just compensation in expropriation matters, the condemning authority is to be taxed with reasonable expert witness fees" s 622).

[212] E.g., New Mexico Const art II, § 20; S Carolina Const art I, § 13; Utah Const art I, § 22; *Sabal Trail Transmission, LLC v. +/- 18.27 Acres of Land in Levy Cty, Florida*, 280 F Supp (3d) 1331 at 1334 (ND Fla 2017) (Full compensation under Florida's Constitution does not include general damages, business damages, or lost profits).
[213] See John Lewis, *Treatise on the Law of Eminent Domain in the United States*, 3rd ed (Chicago: Callaghan & Co., 1909) at 1153 (referencing *Ex parte Withers*, 5 SCL 83, 88 (SC Const App 1812)); *Lindsay v. East Bay Street Comm'rs*, 2 SCL 38 (1796) (In Lisdsay, the landowners were required to pay the costs to build the public road on their lands).
[214] See US Const art VI, cl 2; Norman Singer & Shambie Singer, *Sutherland Statutes and Statutory Construction*, 7th ed (Thomson Reuters, 2020) vol 2 s 36:9; *Re Trusteeship of Kenan*, 261 NC 1 at 7, 134 SE (2d) 85 at 90 (1964) ("Any governmental act which overrides the restrictions declared in our Constitution or which thwarts the powers granted to the United States is void" at 90).
[215] See Francis Amendola et al, Corpus Juris Secundum (Thomson Reuters, 2021) vol 16 s 112.
[216] See *First English*, *supra* note 190 at 312–13.
[217] See *First English*, *supra* note 190 at 319, 321.
[218] *Ibid*.
[219] See *Houston v. Moore*, 18 U.S. 1 at 11–12 (1820) ("The State legislature, acting with a sincere desire to promote the objects of the national government, supplied these defects, by adding such details as were indispensably necessary to execute the acts of Congress. There is, then, a perfect harmony between the two laws" at 11–12).
[220] See e.g. *Ex Parte Shires*, 508 SW (3d) 856 at 863 (Tex. App. 2016); *PruneYard Shopping Ctr v Robins*, 447 US 74 at 81 (1980).
[221] See *Poole v District (Twp of)*, 843 A (2d) 422 at 424 (Pa Commw Ct 2004).
[222] See *Re Mountaintop Area Joint Sanitary Auth*, 166 A (3d) 553 at 561 (Pa Commw Ct 2017).
[223] See Ann Burkhart, "Takings and Trespass: Trespass Liability for Precondemnation Entries" (2008) 56 Drake L Rev 341 at 342–45, 352–54. See e.g. *Wilen v Falkenstein*, 191 SW (3d) 791 at 802 (Tex. App. 2006) (exemplary damages recoverable in trespass derived from prejudice or corruption).
[224] See Burkhart, *supra* at 357–60; *Del Campo v Kennedy*, 517 F (3d) 1070 at 1076, 1080–81 (9th Cir. 2008) ("Our reluctance to expand sovereign immunity to private entities is reinforced by the consideration that the recognition of state sovereign immunity with regard to an entity results in restrictions on federal legislative as well as judicial authority with regard to that entity, including 'restrictions on the power of Congress, acting under certain Article I powers, to create privately enforced federal causes of action against the [entity].' . . . So limiting Congress's power to regulate a private company simply because it has contracted with a state would radically alter the bounds and nature of federal authority, while, at the same time, calling into question the distinctive nature of states as sovereign entities." at 1076) (edit in original); Justin Carlin, "State Sovereign Immunity and Privatization: Can Eleventh Amendment Immunity Extend to Private Entities?", Comment, (2009) 5 FIU L Rev 209 at 229–32.
[225] See *United States, Dep't of Interior v 16.03 Acres of Land, More or Less, Located in Rutland Cty., Vermont*, 26 F (3d) 349 at 356 (2d Cir. 1994).
[226] See 42 USC § 4622(a)(1); 49 CFR §§ 24.301(g)
[227] See 42 USC § 4622(a)(4). See also 49 CFR §§ 24.304(a)(1)–(a)(6), 49 CFR § 24.301(d) (relocating business machinery)
[228] See 49 CFR § 24.401(b)
[229] See 42 USC 4601(1), (3), (6); Pub L No 91-646, Title II, § 201, 84 Stat. 1895; 42 USC § 4621(b).
[230] See *Clear Sky Car Wash, LLC v Chesapeake, Virginia (City of)*, 910 F Supp (2d) 861 at 879 (ED Virginia 2012), aff'd, 743 F.3d 438 (4th Cir. 2014) (quoting *Barnhart v Brinegar*, 362 F Supp 464 at 472 (WD Mo 1973)); *Consumers Power Co v Costle*, 468 F Supp 375 at 380 (ED Mich 1979), aff'd, 615 F (2d) 1147 (6th Cir. 1980) ("The Uniform Relocation Assistance Act makes it very clear that Congress intended to set forth guidelines rather than to create rights of the sort giving rise to a legal cause of action" at 380).
[231] See *Marietta (City of) v Summerour*, 302 Ga 645 at 655–56 (2017) (Georgia borrowed the Uniform Relocation Assistance and Real Property Acquisition Policies Act clauses, but did not adopt the Act's disclaimer to make the best practices optional.) *Contra Georgia 400 Indus Park, Inc v Dep't of Transp*, 274 Ga App 153 at 158–59 (2005).
[232] See *Hernandez v Phoenix (City of)*, 130 Ariz 566 at 568–69 (Ariz Ct App 1981) (holding 42 USC 4602 as precludes judicial review of the Uniform Real Property Acquisition Policy and not benefits under the Uniform Relocation Assistance). *Cf* 63 Okl St Ann § 1098 (WL) (Oklahoma's complementing Uniform Relocation Assistance Act expressly removes any contribution to the landowner's eminent domain claim); Calif Gov't Code §§ 7270, 7274 (WL) (restricting the condemnee's rights under the state's relocation assistance chapter); Ohio Rev Code Ann § 163.52 (WL) (restricting the condemnee's rights under the state's relocation assistance chapter)

[233] See Ga Code Ann § 22-1-13.
[234] See 42 USC § 4627
[235] See 42 USC § 4653
[236] See 42 USC § 4654(a), (c) (The judgment must favor the landowner or the U.S. must abandon the proceeding for the landowner to recover "reasonable costs, disbursements, and expenses, including reasonable attorney, appraisal, and engineering fees"). *Pete v United States*, 569 F (2d) 565 at 569 (US Ct Claims 1978) ("plaintiffs are entitled under 42 U.S.C. s 4654(c) to recovery of litigation expenses in a successful inverse condemnation action for the taking by a federal agency of their personal property" at 569)
[237] See 42 USC § 4655(a)(1) (citing 42 USC §§ 4651–52).
[238] See 42 USC § 4655
[239] See 42 USC § 4622(a); 42 USC § 4623(a)(1).
[240] See 42 USC § 4625(b); 49 CFR § 24.205(c)(1).
[241] See Uniform Law Commission, *supra* note 25 (Alabama is the only state to adopt the Model Eminent Domain Code form the Uniform Law Commission ince 1985).
[242] The term *land-use freedom* in the study incorporates eminent domain issues. William Ruger & Jason Sorens, "Land" (2018), online: *Cato Institute* <https://www.freedominthe50states.org/land> (Cato Institute Freedom in the 50 State 2018 edition) (even when controlling for only eminent domain related factors).
[243] See Matthew Cypher *Eminent domain: An evaluation based on criteria relating to equity, effectiveness and efficiency* (Order No. 3033778) (Texas A&M University, 2001) at 91, 128 .
[244] See Ilya Somin, "The Limits of Backlash: Assessing the Political Response to Kelo" in *Property Rights: Eminent Domain and Regulatory Takings Re-Examined* ed by Bruce Benson (New York: The Independent Institute, 2010) at 118–19; Ala Code ss 11-47-170, 11-80-1, 24-2-2, 18-1B-1, 18-1B-2; Edward Sullivan, "The Farmer's Dilemma: Issues of Public Use and Valuation in the Acquisition of Rural Lands for urban use by Eminent Domain" 41:5 Zoning and Planning Law Reports NL 1 at fn 40 (WL) (finding Alabama to have the "most stringent prohibition" against economic development at fn 40); Ala Code s 24-3-2(d) (consent required for taking non-blight land for a blight-related project).
[245] Ala Code s 18-1B-2; Jenelle Marsh, *Alabama Law of Damages*, 6th ed (Thomson Reuters, 2021) s 16:1.
[246] See Ala Code ss 18-1B-1, 11-47-170(b), 11-80-1(b). See also Ala Code ss 24-2-2(c); 24-3-2(c) (restricted definitions of blight excluded the list of impermissible public uses, but allowed transfers for utilities, which is a private benefit for the utility company).
[247] See generally *Puntenney v Iowa Utilities Bd*, *supra* note 70 at 849 (Iowa 2019) (rejecting the trickle down benefits as a sufficient public benefit for the public use test); *Sw Illinois Dev Auth v Nat'l City Envtl, LLC*, 199 Ill (2d) 225 at 241 (Il Sup Ct 2002).
[248] See Ala Code § 24-2-2(a)(2).
[249] See e.g. *Berman v Parker*, *supra* note 74 at 34–35.
[250] See Fla Stat Ann § 73.014; NM Stat Ann §§ 3-18-10, 3-60A-10 (2015) (WL)
[251] See *Keshbro, Inc v Miami (City of)*, 801 So. (2d) 864, 870 (Fla Sup Ct 2001); *Shamhart v Morrison Cafeteria Co*, 159 Fla 629 at 637 (1947).
[252] See Alan Weinstein, "Eminent Domain: Judicial and Legislative Responses to Kelo" (2006) 58:11 Planning & Environmental Law 3 at 3.
[253] See e.g. *Johnson v Doss*, 500 So (2d) 1129 at 1130–31 (Ala Civ App 1986) (Alabama county rezoned land form agricultural to commercial without issue). *Cf* Ala Code § 11-67-61 (excluding agricultural property with weeds from being declared a public nuisance subject to an abatement order).
[254] See Kansas Stat Ann § 19-292; Kan. Opinion Attorney General No. 2018-4 (19 January 2018).
[255] See Oregon Rev Stat Ann § 215.243; Kushner, *supra* note 130 s 2:14; Nyran Rasche, "Protecting Agricultural Lands in Oregon: An Assessment of the Exclusive Farm Use Zone System" (Paper delivered at Symposium on Oregon Land Use, 1998) 77 Or L Rev 993 at 997, 1004.
[256] See Oregon Rev Stat Ann § 195.305 (Formerly cited as Oregon Stat § 197.352)
[257] See *MacPherson v Dep't of Admin Servs*, 340 Or. 117 at 126 (2006) (discussing Oregon Stat § 197.352 and Measure 37).
[258] See Linda Malone, *Environmental Regulation of Land Use* (Thomson Reuters, 2019) vol 1 s 6:32; Julian Juergensmeyer et al, *supra* note 179 s 13:8.
[259] See Ala Code § 6-5-127. See also Fla Stat Ann § 823.14(6) (Florida's Right to Farm Act).
[260] See *Sadler v Langham*, 34 Ala 311 at 312 (1859); Somin, "Limits of Backlash", *supra* note 120 at 2118 (Alabama infrequently expropriates land compared to other states).

[261] See Ala Const art XII, § 235. See *Hous Auth of Birmingham Dist v Logan Properties, Inc.*, 127 So. (3d) 1169 at 1174 (Ala Sup Ct 2012).
[262] See Epstein, "Taking", *supra* ntoe 47 at 52–53.
[263] See Ala Const art XII, § 235; *Jefferson Cty v S Nat Gas Co*, 621 So (2d) 1282 at 1287–88 (Ala Sup Ct 1993); *Thompson v Mobile (City of)*, 240 Ala 523 at 527 (1941) (concerning damage during the installation of a public improvement); *Brock v Anniston (City of)*, 244 Ala 544 at 550 (1943) (A city must pay consequential damages for taking property, but the Federal Government does not pay consequential damages under the Fifth Amendment and the Alabama State government does not pay consequential damages under Ala Const Art I, § 23). *Contra Re Condemnation of 2719, 21, 11 E Berkshire St*, 20 Pa Cmwlth 601 at 605–06 (1975) (Pennsylvania has a consequential damages requirement only for local governments); *State ex rel. Riddle v. Dep't of Highways*, 154 W Va 722 at 725, 727 (1971) (In West Virginia, the State Constitution does not expressly restrict consequential damages to local governments, but no case has answered whether landowners can charge consequential damages against State eminent domain. In this case, the plaintiff failed to prove he was the owner of the right of access to and from the land, which is necessary to collect damages).
[264] See *Gurley (Town of) v M & N Materials, Inc*, 143 So (3d) 1 at 13, 16, 35 (2012) (Parker J, majority) (Moore, CJ, concurrance), as modified on denial of reh'g (Sept. 27, 2013); *Phillips v Montgomery Cty*, 442 SW (3d) 233 at 240–41 (Tenn Sup Ct 2014) (citing many cases across the country applying the State Constitution's Takings Clause to regulatory taking cases).
[265] See *Logan Properties, Inc*, *supra* note 261 at 1174, 1176.
[266] See *Portersville Bay Oyster Co, LLC v. Blankenship*, 275 So (3d) 124 at 133–34 (Ala Sup Ct 2018), reh'g denied (Oct. 16, 2018).
[267] See Gerald Dickinson, "Federalism, Convergence, and Divergence in Constitutional Property, (2018) 73 U Miami L Rev 139 at 219 (discussing *Gurley (Town of) v. M & N Materials, Inc*, 143 So (3d) 1 at 13 (Ala Sup Ct 2012)).
[268] See *Gurley (Town of) v M & N Materials, Inc*, *supra* note 264 at 15–16, 48, as modified on denial of reh'g (Sept. 27, 2013) (Parker J, majority) (Moore, CJ, concurrance)
[269] See *Joint Ventures, Inc v Dep't of Transp*, 563 So. (2d) 622 at 625 (Fla Sup Ct 1990).
[270] See *Pinellas Cty v Austin*, 323 So (2d) 6 at 9 (Fla Dist Ct App 1975).
[271] See *Dep't of Agric & Consumer Servs v Mid-Fla Growers, Inc*, 521 So (2d) 101 at 103 (Fla Sup Ct 1988)
[272] See *Buegel v Grand Forks (City of)*, 475 NW (2d) 133 at 135 (ND Sup Ct 1991) (quoting, in part, *Fargo (City of) v. Harwood Twp*, 256 NW (2d) 694 at 700 (ND Sup Ct 1977)). See also *Barker v Forsyth Cty*, 248 Ga 73 at 76 (1981); *Murr v. Wisconsin*, 137 S Ct 1933 at 1944–45 (2017) (investment-backed expectations being harmed may create a taking).
[273] See Lucas v SC Coastal Council, 505 US 1003 at 1016 fn 7 (1992); *Keystone Bituminous Coal Ass'n v DeBenedictis*, 480 US 470 at 498, 501 (1987)
[274] See Denise Lynch & Jonathan Purver, *Illinois Real Property* (Thomson Reuters, 2021) vol 9 s 44:26.50 (WL) ("Under the quick-take provisions a condemnor files a motion for title and/or possession, the court enters a preliminary finding concerning the amount of just compensation, and then, upon payment of this preliminary amount, title or the right to possession vests with the condemnor by order of the court." This prevents the landowner's litigation from delaying the public project.")
[275] See Ala Code § 18-1A-52(a). See also Ala Code § 18-1A-284; Ala Const art XII, § 235; *S Nat Gas Co v Ross*, 290 Ala 195 at 198–99 (1973).
[276] See Ala Code § 18-1A-289
[277] *Ibid*.
[278] See *Ex parte Marble City Plaza, Inc*, 989 So. 2d 1065 at 1072 (Ala Sup Ct 2007); *Samford Univ v Homewood (City of)*, 959 So (2d) 64 at 68 (Ala Sup Ct 2006) (Interest starts "on the date the condemnor posts bond on a prospective condemned property, unless the condemnor has taken actual possession of the property before posting bond, in which case the pre-judgment interest on the condemnation award begins to run on the date the condemnor took actual possession" at 68) *Williams v. Alabama Power Co*, 730 So (2d) 172 at 175 (Ala Sup Ct 1999) (Interest ends on the date of the Circuit Court's condemnation order.)
[279] See Sadler v. Langham, 34 Ala 311 at 318, 329–30, 335 (1859) ("A statute which seeks to enforce the right of eminent domain, must designate and define the particular public uses for which the property of the citizen may be taken. If its terms justify a taking for private as well as public uses, it is unconstitutional and void; unless, indeed, it be so framed that the clause which allows the taking for private use is distinct and separate from that which authorizes it for the public use" at 318). See also *Loughbridge v Harris*, 42 Ga 500 at 504–05 (1871) ("The power is one of eminent domain, held by the people, to be used for the people; and when the Legislature clothes individuals

with the right to assert it and take private property for such use under it, Courts cannot recognize such an act as coming within the pale of constitutional authority" at 504–05).
[280] See *Alabama Interstate Power Co. v Mt. Vernon-Woodberry Cotton Duck Co.*, 186 Ala 622 at 635 (1913), aff'd, 240 US 30 (1916) (quoting *Columbus Waterworks Co. v Long*, 121 Ala 245 at 248 (1899)).
[281] See *Sadler v Langham*, *supra* note 279 at 332.
[282] See *Stein v Burden*, 24 Ala 130 at 144, 146 (1854).
[283] *Ibid*.
[284] See *Opinion of the Justices*, 254 Ala 343 at 346 (1950) (the court upheld the Housing Authority to expropriate property and sell them to private individuals. Alabama later amended Ala Code § 11-47-170 to eliminate the practice generally.)
[285] *Ibid*.
[286] See generally *Ibid*; Ala Code § 24-3-3.
[287] See *Johnston v. Alabama Pub Serv Comm'n*, 287 Ala 417 at 432 (1971) (Bloodworth, J, dissenting); Leonard Coburn, "The Case for Petroleum Pipeline Deregulation" (1982) 3 Energy LJ 225 at 253 (At least 22 states have laws relating to eminent domain and/or common carrier responsibilities of pipelines: Arizona, Arkansas, California, Colorado, Indiana, Kansas, Kentucky, Louisiana, Michigan, Montana, Nebraska, Nevada, New Mexico, New York, Ohio, Oklahoma, Pennsylvania, South Dakota, Tennessee, Texas, West Virginia, and Wyoming).
[288] See Ariz Rev Stat Ann § 12-1136(5), 12-1131; VA Code Ann § 1-219.1 (quoting VA Const art 1, § 11); Wyo Stat Ann § 1-26-801
[289] See *Parrish v Bayou La Batre (City of)*, 581 So (2d) 1101 at 1102 (Ala Civ App Ct 1990). See generally James Freda, "Does New London Burn Again? : Eminent Domain, Liberty and Populism in the Wake of Kelo", Note, (2006) 15 Cornell JL & Pub Pol'y 483 at 505 (most states adopted this approach with reluctance).
[290] See Ala Const art I, § 23; art XII, § 235. See generally Maureen Brady, "The Damagings Clauses" (2018) 104 Va L Rev 341 at 415.
[291] See *Gurley (Town of) v M & N Materials, Inc*, *supra* note 264 at 35, as modified on denial of reh'g (Sept. 27, 2013) (Moore, CJ concurring)
[292] *Sadler v Langham*, *supra* note 279 at 335 (quoting *Oakley v Aspinwall*, 3 NY 547, 568–69 (NY App Ct 1850))
[293] See Ala Const §§ 23, 235.
[294] *Supra* note 215. *Cf Gurley (Town of) v M & N Materials, Inc*, *supra* note 264 at 13 (the Alabama Supreme Court applied federal law on the Fifth Amendment to its municipal eminent domain power clause in its constitution (§ 235). The Court did not need to do this given Alabama's existing eminent domain jurisprudence).
[295] See Ala Code § 18-1A-173.
[296] See Salkin, *supra* note 65 at 17:22; Mich Const Art X, § 2 (125% above fair market value); Mich Comp Laws Ann § 213.23(5); Mo Stat Ann § 523.039 (125% above fair market value for homesteads); Conn Gen Stat Ann § 8-129(2) (125% above fair market value); Ind Code Ann 32-24-4.5-8(a) (125% of fair market value for agricultural land and 150% of fair market value for residential land).
[297] See Mo Rev Stat § 523.039(3); *Cape Girardeau (City of) v Elmwood Farms, LP*, 575 SW (3d) 280 at 284–85 (Mo Ct App 2019), reh'g and/or transfer denied (11 April 2019), transfer denied (4 June 2019) (heritage value for the expropriated family farm is an additional compensation award wherever applicable).
[298] See Mo Rev Stat § 523.039(3)
[299] See Conn Gen Stat Ann § 8-129(2).
[300] *Ibid*.
[301] See Ala Code §§ 11-47-170(c), 11-80-1(c); 18-1B-2 (The condemnees have 90 days on and after the offer date to repurchase the properties).
[302] See *Paulk v McCarty*, 855 So (2d) 1123 at 1126 (Ala Civ App Ct 2003)
[303] See Ala Code § 18-1A-232; *Weeks v Herlong*, 31 So (3d) 122 at 125–26 (Ala Civ App Ct 2009) (To recover attorney fees, the common law interpretation requires "the result of the judgment must, at the very least, reduce the size of the right-of-way easement sought and result in the owner of the property keeping more of his or her property free from the right-of-way easement than what was proposed to have been taken through the action" at 125).
[304] See Ala Code 1975 § 11-80-2 (local governments are empowered to comply with the Federal standard paying relocation costs, but its not mandative).
[305] See Ala Code §§ 18-4-4, 18-4-5 (The state standard copied the Federal Uniform Relocation Assistance Policy (42 USC § 4623), but increased the occupancy requirement to 180 days before the eminent domain negotiations commenced.); Ala Code § 18-4-13 (the $22,500 is adjusted to the new federal standard under this section).
[306] See Ala Code 1975 §§ 23-1-210, 23-1-211, 23-1-212; See also Ala Code § 18-4-7(b) (The state agency may offer relocation assistance to adversely impacted neighboring landowners.)

[307] See *Alabama v Woodham*, 288 Ala 608 at 610–11 (1972)
[308] See Cal Civ Proc Code § 1263.510.
[309] See Vt. Stat. Ann. tit. 19, § 501
[310] See *Harco Drug, Inc v Notsla, Inc*, 382 So (2d) 1 at 4–5 (Ala Sup Ct 1980). *Cf Kayo Oil Co v Alabama*, 340 So (2d) 756 at 759 (Ala Sup Ct 1976); *Drummond Coal Co v Alabama*, 548 So.2d 430 at 431–32 (Ala Sup Ct 1989).
[311] See *Drummond Coal Co v Alabama*, 548 So (2d) 430 at 433 (Ala Sup Ct 1989).
[312] See *Sadler v Langham*, *supra* note 279 at 334–35; *Ex parte Melof*, 735 So (2d) 1172 at 1911, 1206–07 (Ala Sup Ct 1999) ("Justice Hugo L. Black believed strongly that stare decisis had no role in matters of constitutional error" at 1911) (quoting *Ex parte Dan Tucker Auto Sales, Inc*, 718 So (2d) 33 at 42 fn 10 (Ala Sup Ct 1998); Thomas Lee, "Stare Decisis in Economic Perspective: An Economic Analysis of the Supreme Court's Doctrine of Precedent" (2000) 78 NC L Rev 643 at 648–52.
[313] See James Ayers, "Interpreting the Alabama Constitution" (2010) 71 Ala Lawyer 286 at 288; Randy Kozel, "Original Meaning and the Precedent Fallback" (2015) 68 Vand. L. Rev. 105 at 116–18.
[314] See *Oakley v Aspinwall*, 3 NY 547 at 568 (1850)
[315] See *Mohammad Faizal bin Sabtu v PP*, [2013] 2 LRC 470, [2012] SGHC 163 (Sing), appealed and dismissed on different grounds [2013] SGCA 1, [2013] 2 SLR 141; *Lo Pui Sang and Others v Mamata Kapildev Dave and Others (Horizon Partners Pte Ltd, intervener) and other appeals*, [2008] SGHC 116 at para 6 (Sing).
[316] See "Constitution (Amendment) Bill", 2nd Reading, Singapore, *Parliamentary Debates*, 1-1, vol 24 (22 December 1965) at cols 435–36 (Lee Kuan Yew, Prime Minister), online: *Parliament Singapore* <https://sprs.parl.gov.sg/search/topic?reportid=005_19651222_S0002_T0002> ["Constitution (Amendment) Bill"]; *Ahmad Kasim bin Adam v Moona Esmail Tamby Merican s/o Mohamed Ganse*, [2019] SGCA 23 at para 80, [2019] 1 SLR 1185 (Sing).
[317] See Aya Gruber, "Public Housing in Singapore: The Use of Ends-Based Reasoning in the Quest for a Workable System" (1997) 38 Harv Int'l LJ 236 at 241.
[318] See Souchou Yao, *Singapore: The State and the Culture of Excess* (Abingdon, UK: Routledge, 2007) at 1; See also Jon ST Quah, "Lee Kuan Yew's Enduring Legacy of Good Governance in Singapore, 1959-2015" (2015) 4:4 Asian Education & Development Studies 374 at 374.
[319] See "Constitution (Amendment) Bill", *supra* note 316; *Yong Vui Kong v PP*, [2015] SGCA 11 at 21 (Sing).
[320] See Ngiam Tong Dow, "Taking Over Private Turf For Public's Good" (2 February 2007), online: *Newspaper SG* <https://eresources.nlb.gov.sg/newspapers/Digitised/Article/today20070202.2.9.9>; Singapore Parliamentary Debates, Official Report (10 June 1964) vol 23 at col 26 (Lee Kuan Yew, Prime Minister); Denis Binder, "The Deceptive Allure of Singapore's Urban Planning to Urban Planners in America" (2019) 3:1 J of Comparative Urban L & Policy 155 at 160.
[321] See Gruber, *supra* note 317 at 242; WJM Ricquier, "Public Housing Law in Singapore" (1987) 8 Urban L & Policy 313 at 316.
[322] See Christopher G. Tiedeman, *Treatise on State and Federal Control of Persons and Property in the United States Considered from Both a Civil and Criminal Standpoint* (St. Louis: F.H. Thomas Law Book Co., 1900; Union, NJ: Lawbook Exchange, 2002) at 696.
[323] *Ibid*. Today, U.S. municipalities rely heavily on land scarcity arguments in urban areas. Brief of Amici Curiae Conference of Municipalities and the State Municipal Leagues of Alabama et al., at 4, 7–8, *Kelo v New London (City of)*, 125 S Ct 2655 (2005) (No. 04-108) (21 January 2005), 2005 WL 176426. *Contra* e.g., *Com., Dep't of Highways v Burchett*, 367 SW (2d) 262 at 264 (Kentucky Ct App 1963) (A land's scarcity and valuableness are not dispositive factors to validate a taking by necessity).
[324] See Denis Binder, "The Deceptive Allure of Singapore's Urban Planning to Urban Planners in America" (2019) 3:1 J of Comparative Urban L & Policy 155 at 160, 175, 179.
[325] See *Lo Pui Sang and Others, supra* note 315 at para 6.
[326] See US Const art I, § 10, cl 1.
[327] See *W River Bridge Co v Dix*, 47 U.S. 507 at 532–33 (1848)
[328] See John McGinnis, "The Original Constitution and Its Decline: A Public Choice Perspective" (1997) 21 Harv JL & Pub Pol'y 195 at 199.
[329] See Lutz-Christian Wolff, "The Relationship between Contract Law and Property Law" (2020) 49:1 Common Law World Review 31 at 37–38 (a United Kingdom perspective); *Long Island Water-Supply Co v Brooklyn (City of)*, 166 US 685 at 690 (1897); *Cincinnati (City of) v Louisville & N.R. Co*, 223 US 390 at 400 (1912).
[330] See *Tay Ah Poon and Another v Chionh Hai Guan and Another*, [1996] SGHC 148 at para 27, rev'd on different grounds [1997] SGCA 15 (the frustration doctrine was not a question on appeal). *Contra Lim Kim Som v Sheriffa Taibah bte Abdul Rahman*, [1994] SGCA 15 at paras 47 (the buyer's imprudent completion of the executed land sale

contract does not preclude a frustration of contract argument to stop the sale of inevitably expropriated land unless the buyer was responsible for the expropriation. In this case, the government exercised its acquisition power after the contract was completed, while Tay Ah Poon's contract was frustrated before completion and answered what private remedy would occur when the contract was breached.)

[331] See *Tay Ah Poon and Another*, *supra* note 330 (the frustration doctrine was not a question on appeal).

[332] *Ibid* at 17, 22.

[333] See US Const amend XIV s 1; *McKinney v Pate*, 20 F (3d) 1550 at 1561 (11th Cir 1994); *Zinermon v Burch*, 494 US 113 at 125 (1990).

[334] See *Board of Regents of State Colleges v Roth*, 408 US 564 at 572 (1972), citing Meyer v Nebraska, 262 US 390 at 399 (1923)).

[335] *Constitution of the Republic of Singapore* (1985 Rev Ed) art 9(1)

[336] See *Lo Pui Sang and Others, supra* note 315 at para 6; *Tan Eng Hong v AG*, [2011] SGHC 56 at 15 (Sing) aff'd in [2012] 4 SLR 476 at 120.

[337] *Ibid*.

[338] See Thio Li-ann, "Administrative and Constitutional Law" (2008) 2008:1 SAL Ann Rev 1 at 26; *Yong Vui Kong*, *supra* note 319 at 21 (fear of flooding the courts with vexatious litigation). See generally "Constitution (Amendment) Bill", *supra* note 316.

[339] See *Constitution of the Republic of Singapore* (1985 Rev Ed) art 93; *Chan Hiang Leng Colin v Public Prosecutor*, [1994] 3 SLR(R) 209 at para 50; *Taw chenk kong*, [1998] 2 SLR(R) 489 at para 89.

[340] See *Lo Pui Sang and Others, supra* note 315 at para 6.

[341] *Ibid*. This rule does not apply to incarceration law; *Constitution of the Republic of Singapore* (1985 Rev Ed) art 9(1), (3)–(4).

[342] *Contra* e.g. Adam Lamparello, "Justice Kennedy's Decision in Obergefell: A Sad Day for the Judiciary" (2015) 6 Houston L Rev 45 at 51.

[343] See Thio Li-ann, *A Treatise on Singapore Constitutional Law* (Academy Publishing, 2012) at 641. *Lim Meng Suang v AG***,** [2014] SGCA 53, [2015] 1 SLR 26 at para 101 (the Singapore Court of Appeals does not aspire to act as a "mini-legislature" at para 101).

[344] See Li-ann, *supra* note 343 at 643.

[345] See Li-ann, *supra* note 343 at 544–46 ; Thio Li-ann. "'It Is A Little Known Legal Fact': Originalism, Customary Human Rights Law And Constitutional Interpretation: Yong Vui Kong v. Public Prosecutor" (2010) Singapore Journal of Legal Studies 558 at 569–70, 73–74; "Constitution of the Republic of Singapore", online: *Singapore Statutes Online* <https://sso.agc.gov.sg/Act/CONS1963?Timeline=On#pr5-> (timeline shows a six amendments to the constitution over the past decade).

[346] See *Eng Foong Ho v Singapore (AG)*, [2009] SGCA 1, [2009] 2 SLR(R) 542 at para 28, 30–31, 35, 39.

[347] See *Ibid* (citing *Sioux City Bridge Co v Dakota County*, 260 US 441 at 446, 447 (1923)). See also *Howe Yoon Chong v Chief Assessor Singapore* [1979–1980] SLR (R) 594 at para 13

[348] See Li-ann, *supra* note 343 at 451, 508 s 10.002, 10.149. See generally Denis Binder, "The Deceptive Allure of Singapore's Urban Planning to Urban Planners in America" (2019) 3:1 J of Comparative Urban L & Policy 155 at 160

[349] See *Constitution of the Republic of Singapore* (1985 Rev Ed) art 12.

[350] See *Eng Foong Ho*, *supra* note 346 at paras 34–35.

[351] *Ibid* at para 25.

[352] *Ibid*; *Chief Assessor, Property Tax, Singapore v Howe Yoon Chong*, [1980-1981] SLR 36 at 13.

[353] See *Ahmad Kasim bin Adam*, *supra* note 316 at 80.

[354] See *Novelty Department Store Pte Ltd v Collector of Land Revenue*, [2016] SGCA 15 at 36, [2016] 2 SLR 766 (Sing) (Justis).

[355] See *Lo Pui Sang and Others, supra* note 315 at 7.

[356] *Ibid* at 7.

[357] *Ibid* 17.

[358] See *City Developments Ltd v Chief Assessor*, [2008] 4 SLR 150–51 at 154, 157, [2008] 4 SLR (R) 150 (Sing) (Justis).

[359] *Ibid* at paras 5, 11, 17, 19.

[360] See generally Bryan Chew et al., "Compulsory Acquisition of Land in Singapore: A Fair Regime?" (2010) 22 Singapore Academy L.J. 166 at 172, 187.

[361] See *Land Titles Act* (Cap 157, 2004 Rev Ed) s 8 (Sing). See generally, *Development Bank of Singapore Ltd v Eng Keong Realty Pte Ltd and Another*, [1990] SGHC 21, [1990] SLR 357.

[362] *Ibid*
[363] See *Teng Fuh Holdings Pte Ltd v Collector of Land Revenue*, [2006] SGHC 93, [2006] 3 SLR (R) 507 at paras 35–36, 55, 58 (Sing) (Justis) [*Teng Fuh* HC], aff'd [2007] SGCA 14 (improper appeal application dismissed the case).
[364] See GOH Yihan, "Tort Law in the Face of Land Scarcity in Singapore" (2009) 26 Ariz J Int'l & Comp L 335 at 381–82; *Teng Fuh* HC, *supra* at para 26 (quoting [2006] 3 SLR(R) 507 at 36).
[365] See "Land Acquisition Bills" Singapore, *Parliamentary Debates*, 0-1, vol 23 (16 July 1965) at col 812 (E. W. Barker, Minister of Law), online: *Parliament Singapore* <https://sprs.parl.gov.sg/search/topic?reportid=010_19650616_S0004_T0010>. See also "Constitution (Amendment) Bill", *supra* note 316.
[366] *Ibid.*
[367] See Epstein, "Takings", *supra* note 47 at x.
[368] *Land Acquisition Act* (Cap 152, 1985 Rev Ed) s 5(1), (3) (sing) ["LAA"]; *Galstaun and Another v Singapore (AG)*, [1980] SGHC 17 at para 7; *Sheriffa Taibah bte Abdul Rahman v Lim Kim Som*, [1994] SGCA 15 at para 44 (the landowner has no right to object to the acquisition).
[369] See LAA, *supra* s 5(1)(b).
[370] See LAA s 5(3); Planning Act (Cap 232, 1998 Rev Ed), s 22(7) (Sing); *Per Ah Seng Robin and another v Housing and Development Board and another* [2015] SGCA 62 at para 63.
[371] *Ibid*; *Borissik Svetlana v Urban Redevelopment Authority*, [2009] SGHC 154 at para 29, 34. *Galstaun*, *supra* note 368 at paras 9–10; *Eng Foong Ho and Others v Singapore (AG)*, [2008] SGHC 69 at para 25, aff'd in [2009] SGCA 1 at para 39 (the Courts cannot decide on what is a better public purpose).
[372] *Sheriffa Taibah bte Abdul Rahman*, *supra* note 368 at 42.
[373] See Jack Tsen-Ta Lee, "We Built this City: Public Participation in Land Use Decisions in Singapore" (2015) 10:2 Asian J Comparative Law 213 at *10, *21.
[374] See *Galstaun*, *supra* note 368 at paras 17–18 (quoting *Syed Omar Alsagoff v The Government of the State of Johore* [1979] 1 MLJ 49 at 50; *Borissik Svetlana v Urban Redevelopment Authority*, [2009] SGHC 154 at paras 34, 42 (the Urban Redevelopment Authority's decision, which is a subsidiary of the Ministry of National Development, was neither irrational nor decided on an extraneous objective)).
[375] See *City Developments Ltd*, *supra* note 358 at 9 (quoting Halsbury's Laws of Singapore: Administrative and Constitutional Law, vol 1 (Butterworths Asia, 1999) at para 10.029)
[376] See *Teng Fuh Holdings Pte Ltd*, *supra* note 368 at para 55 (The public purpose is deliberately overbroad. "The allegation of bad faith or mala fides is not one that ought to be taken lightly – even in proceedings such as these where only a low threshold of proof is required" at para 55.)
[377] See *Galstaun*, *supra* note 368 at paras 16–17 (quoting *Syed Omar Alsagoff v The Government of the State of Johore*, [1979] 1 MLJ 49 at 50) (Although *Alsagoff* is a Malaysian case, the judge did not denounce the decision and considered it persuasive in Singapore. at para 18).
[378] See *Ahmad Kasim bin Adam*, *supra* note 316 at paras 76, 78–80.
[379] *Ibid* at para 13, 16.
[380] *Ibid* at para 75–77, 81–82.
[381] See *Teng Fuh* HC, *supra* note 368 at paras 48–50, aff'd [2007] SGCA 14 (improper appeal application dismissed the case, but a change of the public use does invalidate the acquisition without proof of bad faith.).
[382] See *Teng Fuh Holdings Pte Ltd v Collector of Land Revenue*, [2007] SGCA 14 at paras 36–42 [*Teng Fuh* CA] (citing *Yeap Seok Pen v Kelantan (State of)*, [1986] 1 MLJ 449 at para 27).
[383] See *Sheriffa Taibah bte Abdul Rahman*, *supra* note 368.
[384] LAA s 5(1)(c).
[385] See *Teng Fuh* HC, *supra* note 368 at paras 50–52 (quoting Singapore Parliamentary Debates, Official Report (10 June 1964) vol 23 at col 26).
[386] *Teng Fuh* HC, *supra* note 368 at para 50.
[387] See *Ng Boo Tan v Collector of Land Revenue*, [2002] SGCA 36 at para 58.
[388] See *Teng Fuh* CA, *surpa* note 382 at paras 4, 20. See also Singapore Parliamentary Debates, Official Report (11 April 2007) vol 83 at col 376–77 (Prof S Jayakumar, Deputy Prime Minister and Minister for Law)
[389] See LAA s 5(1).
[390] See *Ng Boo Tan*, *supra* note 387 at para 58. See e.g., *Sheriffa Taibah bte Abdul Rahman*, *supra* note 368 at para 2 (property taken for "general redevelopment"); *Teng Fuh* CA, *supra* note 388 at paras 2, 36 (Property taken for "general redevelopment" and holding "general development" and general *re*development" as prima facie distinct.

The case was dismissed for an untimely pleading.) (emphasis added); *Eng Foong Ho and Others*, *supra* note 371 at para 21, 23.
[391] See *Teng Fuh* HC, *supra* note 368 at para 53.
[392] See LAA s 33(1) (Amended by Act 19 of 2007, effective from 07 May 2007). See also *Oei Choon Guan Ernie v Collector of Land Revenue*, AB 2018.003 (Land Acquisition Act Appeals Board 2019) at para 4.3.
[393] See Denis Binder, "The Deceptive Allure of Singapore's Urban Planning to Urban Planners in America" (2019) 3:1 J Comparative Urban L & Policy 155 at 189.
[394] See LAA s 33(1). See also the 1995 version and 1973 versions of the Land Acquisition Act s 33 (Sing). Price fixing years varied: 1973, 1986, 1992, and 1995.
[395] See *The Management Corp Strata Title Plan No 2504 v Collector of Land Revenue*, AB No. 2012.010 (Land Acquisition Act Appeals Board 2014) at paras 26–27; *Yong Fah Lin v Collector of Land Revenue*, AB 2001.030 (Land Acquisition Act Appeals Board 2003) at para 33 (The government has no obligation to pay ex-gratia payments, and the courts cannot order such payments); *Seah Hong Say (trading as Seah Heng Construction Co) v Housing and Development Board*, [1992] SGCA 81 at paras 6–7 (Hardship payments are subjective and discretionary; the courts will not use comparable circumstances to justify hardships in future cases when the government decides not to acknowledge the identical hardship).
[396] See *The Management Corp Strata Title Plan No* 2504, *supra* note 395 at paras 26–27; *ExxonMobil Asia Pacific Pte Ltd v Collector of Land Revenue* AB 2012.035 (Land Acquisition Act Appeals Board 2017) at 5, 10; *Seah Hong Say, supra* note 395 at paras 6–7 (An employee who also was a residential tenant at his employer's building resulted in an ex-gratia payment for the employer and employee. Nobody has a blanket entitlement to ex-gratia payments.).
[397] See Bryan Chew, *supra* note 360 at 181.
[398] See *Collector of Land Revenue v Mustaq Ahmad s/o Mustafa*, [2002] SGCA 14
[399] See *Mustaq Ahmad s/o Mustafa*, *supra* at para 10, remanded to *Mustaq Ahmad @ Mushtaq Ahmad (s/o Mustafa) v Collector of Land Revenue*, AB 1996.374 (Land Acquisition Act Appeals Board, 2002) (The Appeals Board compensated Mustaq's lost written permission from the property's taking. at para 15 of AB 1996.374); LAA s 33(5)(e) (Market value cannot account for potential land use. Parliament appears to accept the current zoning permissions and restrictions as increasing or decreasing the compensation award under *Expressio Unius Est Exclusio Alterius*); See also *Swee Hong Investment Pte Ltd v Collector of Land Revenue*, [2004] SGCA 5 at paras 16–17.
[400] See LAA s 34(d); *Chew Ming Teck v Collector of Land Revenue*, [1988] 2 SLR(R) 499 at paras 28–29(CA); *Ng Boo Tan*, *supra* note 387 at para 58.
[401] See *United Indo-Singapura Corp Pte Ltd v Foo See Juan and Another*, [1984] SGHC 27 at para 11–14 (quoting *Robinson & Co Ltd v Collector of Land Revenue*, [1979-1980] SLR (R) 483 at para 11).
[402] See *Ng Boo Tan*, *supra* note 387 at para 58–60.
[403] *Ibid* at para 43, 59.
[404] See generally *Ng Boo Tan*, *supra* note 387 at paras 76, 79, 90 (Chao Hick Tin, JA dissenting).
[405] See Jianlin Chen, "Curbing Rent-Seeking and Inefficiency with Broad Takings Powers and Undercompensation: The Case of Singapore from A Givings Perspective" (2010) 19 Pac Rim L & Pol'y J 1 at 12. See e.g. *Sheriffa Taibah bte Abdul Rahman v Lim Kim Som*, [1992] SGHC 43 at para 91, 93, [1992] 2 SLR 516 (Sing) (Justis) (government notice to expropriate land or restrict its use is not an encumbrance to the land causing a diminution of value in the subject property); *Ng Boo Tan, supra* note 387 at paras 13, 42, 44 (a government scheme may reduce the landowner's compensation award for the expropriation if the landowner benefits from the government's scheme or the property value is reduced from the scheme).
[406] See Bryan Chew, *supra* note 360 at 181.
[407] See *M/S CWT et al v Collector of Land Revenue*, AB 2012.049 (Land Acquisition Act Appeals Board 2014) at paras 18–19 (Parliament repealed "actual earnings" as injurious affection from the statute computing compensation in 1973).
[408] *Ibid* at paras 18–19.
[409] See *Stage Development Pte Ltd (formerly known as Stage Professional Pte Ltd) v Collector of Land Revenue*, AB 1997.012 (Land Acquisition Act Appeals Board 2001) at para 60. *Cf Koh Tat Wan Pte Ltd v Collector of Land Revenue*, AB 2001.047 (Land Acquisition Act Appeals Board 2003) at para 28 ("There is nothing in the language to suggest that the change must have taken place or the appellant must have relocated before the Collector makes his award or before the appeal is heard by this Board" at para 28).
[410] See *Chiu Teng @ Kallang Pte Ltd v Singapore Land Authority*, [2014] 1 SLR 1047 at paras 113, 117, 130 (The Court used the legitimate expectations doctrine, which is less stringent than the promissory estoppel doctrine.)
[411] *Ibid*.

[412] Li-ann, *supra* note 343 at 133–34; Government of Singapore, "Singapore Separates from Malaysia and Becomes Independent: 9th Aug 1965" (2014), online: *History SG* <https://eresources.nlb.gov.sg/history/events/dc1efe7a-8159-40b2-9244-cdb078755013#27>.
[413] See *The Singapore Legal System*, 2nd ed by Kevin Tan (Singapore: Singapore U Press, 1999) at 308.
[414] *Tan Eng Hong v Singapore (AG)*, [2012] 4 SLR 476 at para 47.
[415] See *Kok Seng Chong v Bukit Turf Club and Another*, [1992] SGHC 305 at para 30–31.
[416] See *Tan Eng Hong v Singapore (AG)*, [2012] 4 SLR 476 at para 47.
[417] See *The Republic of Singapore Independence Act 1965* (No 9 of 1965, 1985 Rev Ed), s 6; Li-ann, *supra* note 343 at 134–35. *Cf Butterworth & Co (Publishers) Ltd and Others v Ng Sui Nam*, [1987] SGCA 8 at para 47–48 (the Court did not attempt to make the UK *Copyright Act 1911* conform to the Malaysia Constitution's right to property standard although the Malaysia Constitution applied at the time the issue arose. at 47–48. The original Independence bill excluded the Malaysia Constitution's right to property. See also *Republic of Singapore Independence Bill*, Bill no 43/1965, s 6).
[418] See Tsuyoshi Kotaka, David Callies & Heidi Guth, "Taking Land: Compuslory Purchase and the Regulation of Land in Asia-Pacific Countries" (2001) 9:2 Asia Pacific L Rev 103 at 104.
[419] See *Land Acquisition Act 1960* (1992 Rev Ed) at s 3 (Malaysia) (CommonLII)
[420] See, *Singapore Para Rubber Estate Ltd v Pentadbir Tanah Daerah Rembau Negeri Sembilan*, [2008] 6 MLJ 763 (Federal Court, Purtrajaya) (Malaysia). *Dan Jajahan Kota Bharu*, [2016] MLJU 240 (Court of Appeal) (Malaysia) (no compensation for governments illegal conduct and trespass on the land).
[421] See *Collector of Land Revenue South West District Penang v Kam Gin Paik*, [1986] 1 WLR 412 at 418 (Privy Council)
[422] See *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat*, [2017] 3 MLJ 561 (Government pays for expropriated land and loss suffered from termination of project, no other losses. Higher courts cannot question the compensation package determined in the lower court); *Exxonmobil Malaysia Sdn Bhd v Pentadbir Tanah Daerah Petaling*, [2015] MLJU 0314 (Court of Appeal) (Malaysia) (reasonable incidental expenses due to the expropriation are recoverable).
[423] Search "Land Acquisition Act - Declaration under section 5" at the *Singapore eGazette* website <http://www.egazette.com.sg/Search.aspx> from period "2020 – 2011" in the "Government Gazette". 46 files are found each containing a Public Purpose Declaration under Section 5 of the Land Acquisition Act. Between 2001 to 2010, 58 "Land Acquisition Act - Declaration under section 5" were issued in the Government Gazette. Of course, online records may not be a complete achieve of Government Gazette publications.
[424] See Aya Gruber, *supra* note 317 at 247; See e.g. Tan Kee Yong, *Singapore Government Gazette No. 2184 – Land Acquisition Act (Chapter 152), Declaration Under Section 5* (20 August 2010) (Singapore had a larger list of expropriated lots in some 2001 through 2010 Gazettes. The cited Gazette had 22 lots expropriation eligible).
[425] See Gruber, *supra* note 317 at 247.
[426] See The Economist, "Why 80% of Singaporeans live in government built flats" (6 July 2017), online: *The Economist* <https://www.economist.com/asia/2017/07/06/why-80-of-singaporeans-live-in-government-built-flats>; Anna Hall, *Urban Land Rent: Singapore as a Property State* (MA: John Wiley & Sons, 2016) at 216.
[427] See Denis Binder, "The Deceptive Allure of Singapore's Urban Planning to Urban Planners in America" (2019) 3:1 J of Comparative Urban L & Policy 155 at 160, 189–90; Laney Zhang, "Firearms-Control Legislation and Policy: Singapore" (February 2013), online: *Library of Congress* <https://www.loc.gov/law/help/firearms-control/singapore.php> (Singapore has strong gun control laws. The Second Amendment of the U.S. Constitution was not addressed in the journal paper cited); Patricia Salkin & Daniel Gross, "International Comparative Property Rights: A Cross-Cultural Discipline Comes of Age" (2012) 1 Brigham-Kanner Property Rights Conference J 41 at 91 (Chile has a constitutional right to property, yet it authorized land redistribution reform.)
[428] See Salkin & Gross, *supra* note 427 at 90 (arguing, for example, how South Africa has strong constitutional and social obligations to protect property, but South Africa fails to uphold these constitutional standards).
[429] See Hofstede Insights, "Culture Compass: Find your way across Cultures", online: *Hofstede Insights* <https://hi.hofstede-insights.com/the-culture-compass>.
[430] See Hofstede Insights, "Country Comparison", online: *Hofstede Insights* <https://www.hofstede-insights.com/country-comparison/new-zealand,singapore,switzerland,the-usa/> (Specifically the Singapore tab discusses the *Power Distance* and *Individualism*).
[431] *Ibid*.
[432] Assuming the Uniform Real Property Acquisition Policy does not apply, and there is no pro-bono organizations assist with the case.
[433] *Supra* note 430.

[434] See Mr E W Barker, Singapore Parliamentary Debates, Official Report (22 June 1966) vol 25 at col 133; Mr E W Barker, Singapore Parliamentary Debates, Official Report (26 October 1966) vol 25 at col 410. See e.g. *Ng Boo Tan*, *supra* note 387 at paras 88–89; Thio Li-ann, "The Universal Declaration of Human Rights at 60" (2009) 21:1 SAcLJ 293 at 300; Anne Hall, *supra* note 426 ch 4.
[435] See Choon-Piew Pow, "From housing a nation to Meeting Rising Asirations: Evolution of Public Housing over the Years" in *Changing Landscapes of Singapore: Old Tensions, New Discoveries* ed by Elaine Lynn-Ee Ho, Chih Yuan Woon & Kamalini Ramdas (Singapore: Singapore NUS Press, 2013) 43 at 45.
[436] See LAA s 5(3); *Sheriffa Taibah bte Abdul Rahman*, *supra* note 368 at 42.
[437] See Li-ann, *supra* note 343 at 139 (no landowner ombudsperson rights).
[438] See Thio Li-ann, "Lex Rex or Rex Lex? Competing Conceptions of the Rule of Law in Singapore" (2002) 20 UCLA Pac Basin LJ 1 at 19.
[439] See The World Bank, "TCdata360: Political Stability[,] No Violence" (2019), online: *The World Bank* <https://tcdata360.worldbank.org/indicators/h395cb858?indicator=379&viz=bar_chart&years=2018#table-link> (Ranking countries, including Singapore, based on the "[p]erceptions of the likelihood of political instability and/or politically-motivated violence"); The World Bank, "Interactive Data Access" (2021), online: *Worldwide Governance Indicators* <http://info.worldbank.org/governance/wgi/Home/Reports> (Singapore ranks in the top five nations for political stability in 2018, with a score of 98.57 out of 100); Credendo, "Singapore", online: *Credendo* <https://www.credendo.com/country-risk/Singapore> (Singapore has very low political or government corruption risk).
[440] See Wendy Brown & Janet Halley, eds, *Left Legalism/Left Critique* (Duke U Pr, 2002) at 13–14; Leong Weng Kam, "Ex-PAP man recounts 1957 'kelong meeting'", *The Straits Times* (11 June 2016), online: *The Straits Times* <https://www.straitstimes.com/singapore/ex-pap-man-recounts-1957-kelong-meeting>.
[441] See John McGinnis, "The Original Constitution and Its Decline: A Public Choice Perspective" (Paper delivered at The Sixteenth Annual National Student Federalist Society Symposium on Law and Public Policy-1997, 1997) 21 Harv JL & Pub Pol'y 195 at 197–98, 203 ("Democracy on a large scale paradoxically constrains the power of majorities more than democracy on a small scale, because any long-term redistributionist scheme in favor of the current majority would tend to be frustrated by the insecure and shifting ground of ever-changing and multiple coalitions. … some economists have come to believe that constitutional federalism was historically the most important factor in restraining special-interest groups and was responsible for substantial economic growth by checking their ability to promote wealth redistribution" at 197–98, 203); The Federalist No 10 (James Madison), online: *Bill of Rights Institute* <https://billofrightsinstitute.org/founding-documents/primary-source-documents/the-federalist-papers/federalist-papers-no-10/>.
[442] See Oliver Pauchard, "Why is Bern the capital of Swizterland" (28 November 2018), online: *swissinfo.ch* <https://www.swissinfo.ch/eng/-federal-city-_why-is-bern-the-capital-of-switzerland-/44577476> (Switzerland choose Bern as the nation's capital to separate the concentration of power. Most other European countries have their largest city as their capital city); The Federalist No 10 (James Madison) ("The smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plans of oppression.")
[443] See e.g. *Internal Security (Prohibition of Publications) (Consolidation) Order* (Cap 143, O 413, 1990 Rev Ed) (The *People's Action Party's* has indirectly taken action by banning communist books.); *Chng Suan Tze v Ministry of Home Affairs and Others and other appeals*, [1988] SGCA 16 at paras 10 (discussing the Internal Security Act authorized the stop a communist conspiracy and other activities propagating Marxism or communism); *Teo Soh Lung v Ministry of Home Affairs and Others*, [1990] SGCA 5 at para 35 (a Marxist plot was a national security interest matter). *Cf* "Singapore lifts ban on communis, but not on Jehovah's Witnesses" (28 November 2015), online: *AsiaNews.it* <http://www.asianews.it/news-en/Singapore-lifts-ban-on-communism,-but-not-on-Jehovah%27s-Witnesses-36002.html> (Some communist literature has been removed from circulation ban under the Undesirable Publication Act 1967's Undesirable Publication Order).
[444] See *Teng Fuh* HC, *supra* note 368 at para 36 (the courts grant the government flexibility until the discretion or power is abused: i.e., acts in bad faith).
[445] See e.g. *Resource Management Act 1991* (NZ), 1991/69, ss 85–86, 185–186 [*Resource Management Act*]; *Urban Development Act 2020* (NZ), 2020/42, ss 256, 259 [*Urban Development Act*]
[446] See Geoffrey Palmer, "What the New Zealand Bill of Rights Act Aimed to Do, Why It Did Not Succeed and How It Can Be Repaired" (2016) 14 NZJ Pub & Int'l L 169 at 171, 179 [G Palmer, "New Zealand Bill of Rights Act"].

[447] See James Allen, "Why New Zealand Doesn't Need a Written Constitution" (1998) 5:4 Agenda: J Policy Analysis & Reform 487 at 487–88 (JSTOR).
[448] See Peter Oliver, *The Constitution of Independence: The Development of Constitutional Theory in Australia, Canada, and New Zealand* (Oxford U Press, 2005) at 323-328; Paul Rishworth et al, *The New Zealand Bill of Rights* (Melbourne, Australia: Oxford U Press, 2003) at 833-837. Peter Hogg, *Constitutional Law of Canada*, 5 ed (Toronto: Thomson Reuters 2019) ss 5.1(a), 5.4.
[449] See *Kamo v Minister of Conservation*, [2018] NZHC 1983, BC201861273 at paras 63, 65–66 (HC) [*Kamo*]; *Combined Beneficiaries Union Inc v Auckland City COGS Committee*, [2009] 2 NZLR 56 at para 99 (CA). One dissenting Parliamentarian justified the termination of the right to property with erroneous statements. She said, "Property is not treated as a fundamental right in US constitutional law" and that the U.S. only compensates "public leases" and not public uses, which encompasses leases. NZ, *Hansard*, Debate" New Zealand Bill of Rights (Private Property Rights) Amendment Bill — Second Reading (Volume: 643; Page:13349) 21 Nov 2007 (Nicky Wagner). *R v Williams*, [2007] 3 NZLR 207 at paras 142, 266 (CA) (rights under the New Zealand Constitution are considered quasi-constitutional).

See *A H Properties Ltd v Tabley Estates Ltd*, [1993] HC Hamilton CP142/92 at 36 (HC) ("… property rights are very strong rights. They rank, in the hierarchy of rights recognised by law, just below absolute constitutional rights. In more colloquial terms, on a scale of one to ten, constitutional rights are a ten, property rights are a nine" at 36). *Cf United States v Carolene Prod Co*, 304 US 144 at 153, n 4 (1938) (The "New Deal" Supreme Court held that some rights should be receive more judicial protection and scrutiny than others, such as those legal issues explicitly mentioned in the Constitution. The Supreme Court denied overturning economic regulations on the basis that it impaired property rights)
[450] See *Combined Beneficiaries Union Inc*, *supra* note 449 at paras 98–100.
[451] See *Waitakere City Council v Estate Homes Ltd*, [2007] 2 NZLR 149 at para 45 (SC); *Tauranga City Council v Minister of Education*, [2019] NZEnvC 32 (1 March 2019) at para 88.
[452] See Albert, *supra* note 166 at 223 (referencing Donald S. Lutz, *Principles Of Constitutional Design*); Astrid Lorenz, "How to Measure Constitutional Rigidity: Four Concepts and Two Alternatives" (2005) 17 J Theoretical Politics 339 at 358–59. Michael Luis Principe, "Dicey Revisited: Great Britain Joins the Fray in Examining Individual Rights Protections in the Westminster System" (1993) 12:1 Wis Intl LJ 59 at 62–63.
[453] See Lorenz, *supra*.
[454] See *New Zealand Bill of Rights Act 1990*, 1990/109, ss 4–6 [*Bill of Rights Act*]
[455] *Ibid*; *New Zealand (AG) v Taylor*, [2019] 1 NZLR 213 at paras 31, 50, 104, 106 (SC) [*Taylor* SC]. See also Andrew Little, "Proactive Release – The New Zealand Bill of Rights (Declaration of Inconsistency) Amendment Bill" (28 May 2020), online (pdf): *Ministry of Justice* <https://www.justice.govt.nz/assets/Documents/Publications/9172-9293-Declarations-of-Inconsistency-Redacted-v2.pdf> (proposed amendment to Bill of Rights Act to notify Parliament of the conflict or breach of the Act, even though the Court cannot overturn the breach).
[456] See *New Zealand (AG) v Taylor*, [2017] 3 NZLR 24 at para 66–67 (CA) [*Taylor* CA], aff'd in [2019] 1 NZLR 213 at paras 50, 71; "Bill allows Declaration of Inconsistency with NZBORA" (18 March 2020), online: *New Zealand Law Society* <https://www.lawsociety.org.nz/news/legal-news/bill-allows-declaration-of-inconsistency-with-nzbora/> (New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill is in progress to develop a judicial remedy when an Act of Parliament is inconsistent with the Bill of Rights Act or the Human Rights Act).
[457] See Matthew Palmer, "New Zealand Constitutional Culture" (2007) 22 New Zealand UL Rev 565 at 589, 592, 596 ("its flexible nature that can evolve to meet and adapt to new circumstances and that trusts the judgment and sensibilities of its citizens" at 592).
[458] John Martinez, *Government Takings* (Thomson Reuters, 2020) s 2:35 (WL); Bryan Schwartz & Melanie Bueckert "Chapter 4. Canada" in Rachelle Alterman, ed, *Takings International: A comparative perspective on Land use Regulations and Compensation Rights* (USA: American Bar Association, 2010) 93 at 95 (Canada); Hogg, *supra* note 448 s 47.4(b) (Canada); Kamo, *supra* note 449 at paras 63, 65–66. Barry Denyer-Green, Compulsory Purchase and Compensation, 10 ed (Routledge, 2014) (UK) at § 25.2 ("In England there is no written constitutional limit on Parliament's powers to authorise restrictions on property rights, and so any Act of Parliament imposing restrictions without compensation is perfectly valid in English law: but that is not to say it may not be contrary to the European Convention . . . the courts assume that property rights are not taken away without compensation unless the legislation so provides in unequivocal terms" at s 25.2.); *Ahmad Kasim*, *supra* note 316 at para 80 (Sing).

[459] See Martinez, *supra* (citing "Omnibus Property Rights Act of 1995," S.343, 104th Congress, 1st Sess (1995) (Gramm); "Private Property Protection Act of 1993," H.B. 561 (1993) (Condit); "Private Property Rights Act of 1991," S.50, 102nd Congress, 1st Sess (1991) (Symms))
[460] See 42 USC § 4602
[461] See *Te Ture Whenua Maori Act/Maori Land Act 1993* (NZ), 1993/4, ss 129(1)–(2), 134, 164; Richard Boast, "Property Rights and Public Law Traditions in New Zealand" (2013) 11 NZJ Pub & Int'l L 161 at 166–67; *Te Atiawa Manawhenua Ki Te Tau Ihu Trust v Attorney General*, CA75/02 BC200360861 at para 40, 99 (NZ CA 19 June 2003) (Unreported Judgment); *Westco Lagan Ltd v New Zealand (AG)*, [2001] 1 NZLR 40 at para 95 (HC) (no constitutional right to property to establish paramount authority to defend private property interest).
[462] See Barbara Van Arsdale et al, *supra* note 102, vol 16B s 629; Christopher Collier, "The Common Law and Individual Rights in Connecticut Before the Federal Bill of Rights" (2002) 76 Conn Bar Journal 1 at 70 fn 14 ("individuals have a natural right to possess and enjoy their property, but it is only through the agency of government that this right can be protected. Their right to property is natural; their right to call on government to implement it is civil" at fn 14).
[463] See *Newland v Child*, 73 Idaho 530 at 537 (1953); *Carolina Beach Fishing Pier, Inc v Carolina Beach (Town of)*, 274 NC 362 at 372 (1968); *Harris Cty Flood Control Dist v Kerr*, 499 SW (3d) 793, 804 (Tex Sup Ct 2016).
[464] See *Kamo*, *supra* note 449 at para 72 (quoting *Hamed v R*, [2012] 2 NZLR 305 at para 161).
[465] See *Westco Lagan Ltd*, *supra* note 461 at paras 57–59. Chapter 28 of the Magna Carta recognizes compensation for seizures of personal property.
[466] *Ibid*.
[467] *Barrett v Police*, HC Hamilton CRI-2003-419-64 (14 June 2004) at para 10 (Unreported Judgment) ("This court's duty is to apply enactments made by the legislature" at para 10). *R v Mason* [2012] 2 NZLR 695 at para 33–34 (HC) (discussing and upholding *Barrett*, [CRI-2003-419-64] and its reasoning. Parliament can extinguish a customary right by enacting a statute without the citizenry's consent.).
[468] See *Naysmith v Accident Compensation Corp*, [2006] 1 NZLR 40 at paras 80 (HC).
[469] See *Bill of Rights Act*, s*upra* 454 s 5. Andrew Butler, "Limiting Rights" (2002) 33:3 VUWLR 113 at 117
[470] See *Public Works Act 1981* (NZ), 1981/35, s 111(2) [*Public Works Act 1981*]
[471] See *Pengelly's Marketing Ltd v New Zealand (AG)*, [2000] 3 NZLR 198 at paras 42, 46–47 (HC).
[472] *Ibid*; *Public Works Act*, *supra* note 469 s 111 (no compensation clause for damage caused to land when exercising the power to enter the property). *Cf Public Works Act*, *supra* note 469 s 111A(7) (a telecommunication or utility company must compensate landowners for damage when they enter the property to undertake a survey or proposed development).
[473] See *Cooper v New Zealand (AG)*, [1996] 3 NZLR 480 (HC).
[474] See *Otehei Bay Holdings Ltd v Fullers Bay of Islands Ltd*, [2011] 3 NZLR 449 at para 41 (CA).
[475] See *H Eagle v Booth* (1883) 2 NZLR (SC) 165 (discussing Goodson v Richardson (1874) L. R. 9 Ch. App. 221). See also *Mackenzie v Waimumu Queen Golddredging Co (Ltd)* [1901] 21 NZLR 231 (SC) (citing *Goodson v Richardson* (1874) L R 9 Ch. App 221).
[476] See *Goodson v Richardson* (1874) LR 9 Ch App 221 at 223 (UK)
[477] See *Urban Development Act*, *supra* note 445 Pt 5; *Public Works Act*, *supra* note 470 s 2 (Definition of "Public Work")*; Local Government Act* (NZ), 2002/84, s 5 (definition of "activity").
[478] The New Zealand Courts have not expressly overruled the power of veto generally or in the riparian property cases in which the principle has been applied.
[479] See *Public Works Act*, *supra* note 470 ss 4A, 4C; *Tararua District Council*, [2009] NZEnvC 245, W74/2009 (25 September 2009) at paras 23–25 (discussing *Upper Hutt City Council v Akatarawa Recreational Access Committee Incorporated*, [2003] NZEnvC 117; [2003] NZRMA 405 (9 April 2003)).
[480] See *Westco Lagan Ltd*, *supra* note 461 at paras 59, 63. *Taylor* CA, *supra* note 456 at para 33 (citing Claudia Geiringer "The Dead Hand of the Bill of Rights? Is the New Zealand Bill of Rights Act 1990 a substantive legal constraint on Parliament's power to legislate" (2007) 11 Otago LR 389 at 391).
[481] See G Palmer, "New Zealand Bill of Rights Act", *supra* note 446 at 175–77, 180 (2016) (finding Human Right Act statutes incompatible with the European Convention for Human Rights did not make the conflict disappear with the judge's ruling). Bill of Rights Act s 7. *Cooper*, *supra* note 473 at 158 ("Our small society has to date found it unnecessary to equip itself with techniques of judicial challenge to Parliament and its work" at 158). *Taylor* SC, *supra* note 455 at para 31 (the first Formal Declaration of Inconsistency was issued in 2019).
[482] See G Palmer, "New Zealand Bill of Rights Act", *supra* note 446 at 177 (2016) (discussing *Taylor v New Zealand (AG)*, [2015] NZHC 1706.).

[483] See Claudia Geiringer & Paul Rishworth, "Magna Carta's Legacy: Ideas of Liberty and Due Process in the New Zealand Bill of Rights Act" (2017) 2017:4 NZLR 597 at 624–625; *New Zealand Council of Licensed Firearms Owners Incorporated v Minister of Police*, [2020] NZHC 1456, BC202061416 at paras 38–39.
[484] See KJ Keith, "A Bill of Rights for New Zealand? Judicial Review Versus Democracy" (1985) 11 NZUL Rev 307 at 308, 312.
[485] Tom Allen, *The Right to Property in Commonwealth Constitutions* (Cambridge: Cambridge U Press, 2004) at 6.
[486] *R & R Fazzolari Pty Ltd v Parramatta City Council*, [2009] HCA 12 at 42 (Austl) (Discussing Blackstone's *Commentaries on the Laws of England*).
[487] See Chye-Ching Huang, *supra* note 2 at 647.
[488] See *Urban Development Act*, *supra* note 445 ss 76–77 (The Public can submit their concerns to the hearings panel pursuant to section 74(2)(b)).
[489] See *Land Valuation Proceedings Act 1948* (NZ), 1948/50, ss 3, 13(1).
[490] *Magna Carta* (UK), 1297, 25 EDW 1 C 29 .
[491] See *Westco Lagan Ltd*, *supra* note 461 at para 34 (HC); *Imperial Laws Application Act 1988* (NZ), 1988/112, s 3(1).
[492] *Ibid* para 42. *Estate Homes Ltd*, *supra* note 451 at para 45.
[493] See *Westco Lagan Ltd*, *supra* note 461 at 42. See generally *Mihos v New Zealand (AG)*, CIV-2004-485-1399, BC200761682 at para 29–35 (HC) (Unreported Judgment). *Contra* Salvas, *supra* note 47 at 1398 (concluding Magna Carta, ch. 28 (1215) started the first compensation requirement when a legal officer seizes personalty – "grains or other chattels").
[494] See *M Canterbury Earthquake Recovery v Ace Developments Ltd*, [2015] NZHC 1027, BC201561360 at para 96 (HC); *Dilworth Trust Board v Counties Manukau Health Ltd*, [2002] 1 NZLR 433 (UK Privy Council) (the *Public Works Act* is the law of the land for Magna Carta protection purposes; thus, no additional protection is afforded); *Riddiford v New Zealand (AG)*, [2009] NZCA 603, BC200966502 at para 26 (The Magna Carta does not guarantee fair compensation; thus, a remedy must be found in a separate Act: i.e., the Public Works Act).
[495] *Ibid*.
[496] See *Estate Homes Ltd*, *supra* note 451 at para 45; *Apa Ngati v New Zealand (AG)*, BC200360831, CA173/01, at para 34 (CA) (Unreported Judgment) [*Apa Ngati*] ("Property rights may be abrogated or redefined through lawful exercise of the sovereign power" at para 34).
[497] See *Estate Homes Ltd*, *supra* note 451 at para 45
[498] See Economic Freedom Indices, *supra* note 33.
[499] See *Apa Ngati*, *supra* note 496; *Buller Hospital Board and Another v New Zealand (AG) and Others*, [1959] NZLR 1259 at 1279 (SC). *Cf Public Works Act 1908* (NZ), 1908/160, s 37, 38 (New Zealand historically had a court to oversee compensation .), online (pdf): *The University of Auckland* <http://www.enzs.auckland.ac.nz/docs/1908/1908C160.pdf >
[500] See *Westco Lagan Ltd*, *supra* note 461 at paras 41– 42.
[501] See *Westco Lagan Ltd*, *supra* note 461 at para 42.
[502] See Russell v Minister of Lands (1898) 17 NZLR 241, 249–50; *Estate Homes Ltd*, *supra* note 451 at para 45.
[503] *Contra* S.C. CONST Art. I, § 13 (2020); https://www.carolana.com/SC/Documents/sc_constitution_1790.html (The 1790 South Carolina Constitution mimicked the Magna Carta in its right to property: Art. IX, § 2).
[504] See *South Carolina v Dawson*, 21 SC 100 at *13 (SC Ct App 1836) (WL).
[505] See Lewis Evans and Neil Quigley "Compensation for Takings of Private Property Rights and the Rule of Law" in Richard Ekins, ed, *Modern Challenges to the Rule of Law* (Wellington: LexisNexis, 2011) 233 at 234.
[506] *Westco Lagan Ltd*, *supra* note 461 at para 95 (emphasis added).
[507] *New Zealand Council of Licensed Firearms Owners Incorporated*, *supra* note 483 at para 37 (citing *R (Jackson) v United Kingdon (AG)*, [2005] UKHL 56, [2006] 1 AC 262 at 102); *Taylor v New Zealand Poultry Board*, [1984] 1 NZLR 394 at 398 (CA) ("[s]ome common law rights presumably lie so deep that even Parliament could not override them" at 398)
[508] See *Cooper*, *supra* note 473 at paras 157–58. *Richard John Creser V R*, BC9860620, CA38/98 (NZ Ct App 1998) (Finding Cooke's ruling controversial). Beverley McLachlin, "Unwritten Constitutional Principles: What Is Going on?" (2006) 4 NZJ Pub & Int'l L 147 at 148–49 (explaining the controversy).

Unlike New Zealand's response to Judge Cooke, American courts treat Cooke's dicta as sound reasoning to prevent government actors from infringing fundamental liberties, regardless if Congress passed a law authorizing the infringement. The Federal Constitution grants a substantive protection of rights under the Due Process Clause of the

Fifth and Fourteenth Amendments. *Reno v Flores*, 507 US 292 at 301–02 (1993); *Washington v Glucksberg*, 521 US 702 at 721 (1997).
[509] See Hogg, *supra* note 448 ss 5.4, 12.1; *New Zealand Constitution (Amendment) Act, 1947* (UK), 11 Geo. VI, c. 4.
[510] See *Westco Lagan Ltd*, *supra* note 461 at paras 91, 95.
[511] See *New Zealand (AG) v Ngati Apa*, [2003] 3 NZLR 643 at 34, 185 (CA); *New Zealand Council of Licensed Firearms Owners Incorporated*, *supra* note 483 at paras 67–68, 71 (the abolishment must be reasonable, and Parliament can repress who receives compensation, the amount of compensation, and what criteria measures the compensable hardship. Parliament expressly excluded economic loss, consequential loss, loss for business interruption, and loss of intrinsic or sentimental value from the compensation formula).
[512] See *New Zealand Council of Licensed Firearms Owners Incorporated*, *supra* note 483 at paras 62–63.
[513] See Palmer, "New Zealand Constitutional Culture", *supra* 457 at 576, 589, 596 (2007); Fiona Barker, "Political Culture: Patterns and Issues" in Raymond Miller (ed) *New Zealand Government and Politics*, 5th ed (Oxford U Press, 2010) 13 at 18.
[514] See *Bill of Rights Act* s 28.
[515] See G Palmer, "New Zealand Bill of Rights Act", *supra* note 446 at 171 (2016)
[516] See *Otehei Bay Holdings Ltd*, *supra* note 474 at para 41.
[517] See Sarah Kerkin, "Designing for Legitimacy: A Systems Perspective" (2017) 15 NZJ Pub & Int'l L 67 at 73.
[518] *Contra Takamore v Clarke*, [2012] 1 NZLR 573 at paras 99, 257–58 (CA) ("whenever any local custom is recognised in common law, there must inevitably be a question as to whether or not the custom is consistent with other principles of common law" at 99) ("The Tūhoe burial custom was dismissed in favor of the common law rule because the Tūhoe burial rule was too dissimilar to the common law and could offend the Pakeha custom. The common law prevents future conflict" at 257–58).
[519] *Ibid*.
[520] *R v Hines*, [1997] 3 NZLR 529 at 579.
[521] R J Paterson, "Procedures Governing the Compulsory Acquisitions of Land under the Public Works Act: The Case for Reform" (1977) 3:2 Auckland UL Rev 177 at 177–78 (quoting the *New Zealand Herald*, 24 March 1976)
[522] *Ibid*.
[523] *Ibid* at 179–80. *Contra Public Works Act*, *supra* note 470 s 24; *Local Government Act 2002* s 189 (cross-referencing the *Public Works* Act to carry out acquisitions).
[524] Katherine Sanders, "Public Access and Private Property: The Queen's Chain and the Custom of Recreational Access" [2012] 2012:2 NZLR 273 at 287 (referring to public access to waterfront lands)
[525] *Ibid* at 288
[526] See *Westco Lagan Ltd*, *supra* note 461 at para 95
[527] See Boast, "Property Rights and Public Law Traditions", *supra* note 461 at 169–70 (ss 10 and 63 of the *Land Transfer Act 1952* transferred lands from the Crown to the people with unchallengeable ownership.)
[528] See *Land Transfer Act 1952* (NZ), 1952/52, ss 63–64; Elizabeth Toomey, "State Guarantee of Title - An Unguided Path" (1995) 6:1 Canterbury L Rev 149 at 162, 163 (citing *Land transfer act 1952*, s 172, compensation for registrar mistakes or malfeasances).
[529] See Boast, "Property Rights and Public Law Traditions", *supra* note 461 at 176–77 (citing *Resource Management Act* s 14, 354 preserving the *Geothermal Energy Act 1953* and *Water and Soil Conservation Act*; citing *Crown Minerals Act 1991* s 10; citing Petroleum Act 1937). *Crown Mineral Act 1991* (NZ), 1991/70, ss 10–11, 76.
[530] See *Crown Mineral Act 1991* (NZ), 1991/70, s 76
[531] See *Gebbie v Banks Peninsula District Council*, [2000] NZHC 621 at para 14, 20–21, 36; [2000] NZRMA 553; *Resource Management Act*, *supra* note 445 s 87 (the permit is known as "resource consent").
[532] See *Falkner v Gisborne District Council*, [1995] 3 NZLR 622 at 632–34.
[533] *Ibid*.
[534] Boast, "Property Rights and Public Law Traditions", *supra* note 461 at 176–77; *Rangitira Developments Ltd v Royal Forest And Bird Protection Society Of New Zealand Inc*, [2020] NZSC 66, BC202061657 at paras 44–45, 49–51 (the repeal of the confiscatory statutes did not remove the Crowns sole ownership of those resources, and the landowners must agree or arbitrate to some kind of access to the natural resources, if the Minister of Energy approves the mining activity. The landowner refusal to allow a third-party to mine on the property is not absolute).
[535] See *Ngati Apa*, *supra* note 511 at 34, 185; *New Zealand Council of Licensed Firearms Owners Incorporated*, *supra* note 483 at paras 67–68, 71.
[536] See Boast, "Property Rights and Public Law Traditions", *supra* note 461 at 176–77 (Energy, water, minerals, and oil have been nationalized and government controlled).
[537] See Credendo, "New Zealand" (2020), online: *Credendo* <https://www.credendo.com/country-risk/new-zealand>

[538] See *Meredith v Inhabitants of Whareama Road District* (1888) 6 NZLR 611 (SC)
[539] *Ibid*.
[540] No current New Zealand journals or cases have discussed the *Meredith v Inhabitants of Whareama Road District* case. Lexis Quicklaw and HeinOnline. *Public Works Act 1981* s 48 (easements can serve as compensation instead of cash).
[541] See *Blunden v Inhabitants of Oxford Road District*, (1901) 20 NZLR 593 at 593, 599, 601, 602 (CA)
[542] See *Public Works Act 1981* s 60(1).
[543] See *Ace Developments Ltd v New Zealand (AG)*, [2017] 3 NZLR 728 at para 65 (CA); *Drower v Minister of Works and Development*, [1984] 1 NZLR 26 at 29 (CA); *Russell v The Minister of Lands* (1898) 17 NZLR 241 at 251 (SC).
[544] *Ace Developments Ltd*, *supra* note 543 at para 65 (CA).
[545] See *Public Works Act 1981* s 62(1)(b) ("the value of land shall, except as otherwise provided, be taken to be that amount which the land if sold in the open market by a willing seller to a willing buyer on the specified date might be expected to realise … ." s 62(1)(b)).
[546] See *Drower*, *supra* note 543 at 36, 39 (uses commercial interest rates); *Green & McCahill Holdings Ltd v Auckland Council (formerly Rodney District Council)*, [2018] NZLVT 40 (27 August 2018) at paras 19–20, 26 (uses Judicature Act interest rates).
[547] See *Jaafar Holdings Ltd v Auckland Council*, [2018] NZLVT 8 (28 May 2018) at paras 9, 43–44, 49.
[548] *Safeway Self Storage Ltd v Wellington Regional Council*, [2017] NZLVT 9 (31 July 2017) at *8.
[549] See *Public Works Act 1981* ss 78(5), 79, 84.
[550] See *Public Works Act 1981* ss 62(1)–(2). See e.g. *Gavigan v Auckland City Council*, [2002] NZLVT 22 at paras 22–31 (17 October 2002) (The specified date was when the Crown vested title in the condemnee's lease property. No meeting of the minds for an oral agreement. at paras 29–31).
[551] See *Riddiford v New Zealand (AG)*, [2005] NZLVT 7 (9 December 2005) at para 132; *Wellington City Corp v Berger Paints NZ Ltd; Wellington City Corp v J Myers & Co Ltd*, [1975] 1 NZLR 184 at 191 (CA).
[552] See *Body Corporate Number 212138 v Minister of Land Information*, [2017] NZLVT 2 (27 March 2017) at paras 12, 14; *Hamilton v Minister of Lands*, [2012] NZLVT 2 (28 June 2012) at para 80.
[553] See *Gray v M Lands*, [2004] NZLVT 3 (23 April 2004) at paras 22– 23. See also *Jacobsen Holdings Ltd v Drexe*l, [1986] 1 NZLR 324 at 328–329 (CA).
[554] See *Gray*, *supra* note 553 at paras 22–24 (a residential healing centre with "four permanent springs; a very beautiful part of the Nukumea Stream; rare native plants; old native trees; native medicinal plants; and native bush" were special values that were excluded from compensation under the common law. at para 26); Brian Angelo Lee, "Uncompensated takings: Insurance, efficiency, and relational justice" (2019) 97:5 Tex L Rev 935 at *16 (ProQuest) ("he hazard would arise and be costly only when all three of the following are true: (1) owners decided to make expensive improvements to their property; (2) the expected value of those improvements, given the probability of a taking, was negative; and (3) the government actually did take that property, making the owners' investments go to waste" at *16)
[555] See *Fernwood Dairies Ltd v Transpower New Zealand Ltd*, [2006] NZEnvC 432; [2007] NZRMA 190 (15 December 2006) at paras 72, 88; *Public Works Act 1981* s 63.
[556] See *Jaafar Holdings Ltd, supra* note 547 at para 45–46.
[557] See *Finlayson v Minister for Public Works*, [1934] NZLR 456 at 461–462, 471 (Full Court).
[558] *Public Works Act 1981* s 18(1)(d).
[559] See *Public Works Act 1981 s*s 72(1)–(1B) (the compensation of $50,000 goes to all landowners if the dwelling is a concurrent estate), 72A(1).
[560] See *Public Works Act 1981* ss 72C (1)–(3).
[561] See *Public Works Act 1981* s 72A(1)(b). *Public Works Act 1981* s 20 discusses agreements to expropriate for compensation allows the land to be acquired as under s 26, stating no objections, withdrawn objections, or dismissed Environment Court cases allows fee simple transfer from the private individual to the government without additional court proceedings.
[562] See *Public Works Act 1981* s 72A(1)(c).
[563] Land Information New Zealand, *Landowner's rights: When the Crown requires your land for a public work* (May 2017), online (pdf): *Land Information New Zealand* <https://www.linz.govt.nz/system/files_force/media/doc/landowners-rights-booklet-201705.pdf?download=1> ("$5,000 at the Minister's discretion ifyour personal circumstances or the circumstances of the acquisition warrant sucha payment.").
[564] See *Public Works Act 1981* s 66(1)(a).

[565] See *Public Works Act 1981* s 66(1)(a)(iii).
[566] See *Public Works Act 1981* s 68(1).
[567] See *Public Works Act 1981* s 66(1)(b).
[568] See *Stringer v Minister of Lands*, [2014] NZHC 776 at para 37; John Burrows, ed, *Land Law* (online looseleaf ed, Brookers) at s 66.03.
[569] See *Gold Star Insurance Co Ltd v Minister for Land Information*, [2013] NZLVT 1 (13 March 2013) at paras 37, 39, 50 (the sole-shareholder needs to be the owner of the affected property to claim disturbance damages).
[570] See *Casata Ltd v Minister for Land Information*, [2020] NZLVT 18 (21 August 2020) at paras 9, 35, 57–58, 60, 64.
[571] See *Body Corporate Number 212138*, *supra* note 552 at 253–257 (the claimant substantiated how the government failed fulfill its reporting requirements, which produced additional compensation; however, the claimant did not show how it loss rental income or business loss caused by the government's delay); *Hamilton v Minister of Lands*, [2012] NZLVT 2 (28 June 2012) at paras 77, 80, 82, 88 (the claimant demonstrated the Crown's demolition of the land impaired the claimant's lease arrangement, confronting operating costs for the loss rental income).
[572] See *Public Works Act 1981* ss 40(1)–(2), 41 (referring to a buyback procedure for former Maroi lands); *Rowan v New Zealand (AG)*, [1997] 2 NZLR 559 at 568 (HC) ("the plain meaning and intent of the section appears to be remedial, bringing to an end a perceived injustice where land could be compulsorily taken by the Crown for one purpose, and arbitrarily used for another without giving the original owner the opportunity to buy it back" at 568).
[573] See *Port Gisborne Ltd v Smiler* [1999] 2 NZLR 695 at para 35 (CA). *Cf Nuku v Origin Energy Resources (Kupe) Ltd*, CIV 2008-404-003607, BC200861696 at para 17 (HC) (when the expropriation to develop the road benefited the farmers marketing their property and ingressing and egressing the land, there was no "history of land being taken from unwilling landowners or under the threat that coercive power would be used" at para 17).
[574] See *Public Works Act 1981* s 40(5); *Kane v New Zealand (AG)*, [2014] NZHC 251, BC201464242 at paras 23–25.
[575] See *Guide Hill Station Ltd v New Zealand (AG)*, [2019] NZHC 3216, BC201963284 at paras 86–90; *Williams v Auckland Council* [2016] NZSC 20 at para 9; GUIDE HILL STATION LTD v A-G [2019] NZHC 3216, BC201963284 at paras 86–90.
[576] See *Williams v Auckland Council*, [2015] NZCA 479, BC201563349 at paras 101, 118–125, aff'd in [2016] NZSC 20 at para 8 (A company's predominate interest or benefit in a Section 40, Public Works Act 1981, buyback litigation makes the interest economic).
[577] See *New Zealand (AG) v Hull* [2000] 3 NZLR 63 at paras 36–39 (CA) (quoting *Hull v New Zealand (AG)*, (1998) 12 PRNZ 523 (HC))
[578] *Ibid*. See e.g. *McElroy v Auckland International Airport Ltd*, [2008] 3 NZLR 262 at para 42 (HC) (18 to 24 months); *Waitakere City Council v Janice Aileen Bennett*, [2009] NZRMA 76, BC200894442 at para 12, 97 (not disputing 18 months).
[579] *Ibid*
[580] See *McElroy v Auckland International Airport Ltd*, [2009] NZCA 621, BC200966836 at 75–76, 78.
[581] See *Public Works Act 1981* s 40(4).
[582] See *Resource Management Act 1991* s 85(1); Philip Joseph, "The Environment, Property Rights, and Public Choice Theory" (2003) 20 NZUL Rev 408 at 426. See e.g. *Estate Homes Ltd*, *supra* note 451 at paras 45–47, 51; Richard Ekins & Chye-Ching Huang, "Reckless Lawmaking and Regulatory Responsibility" (2011) NZ L Rev 407 at 424.
[583] See *Resource Management Act 1991* s 87 (defining resource consents).
[584] See *Resource Management Act 1991* s 110(1).
[585] See *Springs Promotions Ltd v Springs Stadium Residents' Association Inc*, [2006] 1 NZLR 846 at paras 63, 83 (HC) ("Existing use rights enure for the benefit of the owner or occupier of the land for the time being so that the agreements, representations or conduct of a current owner or occupier will not in general bind subsequent owners or occupiers" at para 83); *Resource Management Act 1991* s 122(1) ("A resource consent is neither real nor personal property" s 122)
[586] See e.g. *Bella Vista Resort Ltd v Western Bay of Plenty District Council*, [2007] 3 NZLR 429 at paras 10, 24–25, 61 (CA).
[587] See *JF Investments Ltd v Queenstown Lakes District Council*, [2006] Decision no. 48/2006, BC200669004 (NZ Env Ct) at paras 8, 30, 42.
[588] See Nancy Borrie, P Memon & Peter Skelton, *An International Perspective on Environmental Compensation: Lessons for New Zealand's Resource Management Regime* (Canterbury, NZ: Lincoln University, 2004) at 33.
[589] *Oceana Gold (New Zealand) Ltd v Otago Regional Council*, [2020] NZHC 436, BC202060328 at para 39.

[590] See *Resource Management Act 1991* ss 149E(5), 308B (trying to prevent trade competitors disallowing or delaying the resource consent). See generally Jonathan Cutler, "The Use of the Resource Management Act 1991 for Trade Competition Purposes" (1999) 3 NZ J Envtl L 67 at 84.
[591] See *Resource Management Act 1991* s 104(3)(a); *Southern Alps Air Ltd v Queenstown Lakes District Council*, (2007) 13 ELRNZ 221, [2008] NZRMA 47 at para 54 ("Certainly, trade competition was not entertained as a relevant consideration in assessing Alps Air's consent application. But, the Court's reasoning tends to have that effect. … This, it seems to me, is to accord trade competition a place in the reasoning process which is impermissible" at para 54).
[592] See *Resource Management Act 1991* ss 85(3A)(a); 185(1).
[593] See *Riddiford v Masterton, Carterton and South Wairarapa District Councils*, [2010] NZEnvC 262 at para 51; Environmental Court of New Zealand, "Environment Court Practice Note 2014" at § 6.6(b) at 20, online (pdf): *Resource Management Law Association of New Zealand Inc* <https://www.rmla.org.nz/wp-content/uploads/2016/07/ec_practice_note_2014_(final).pdf>.
[594] See *Resource Management Act 1991* ss 85(3A)(a), (3D) (the landowner may demand the property be expropriated if the landowner held the property interest before the public was notified of the new zoning plan).
[595] See *Resource Management Act 1991* ss 85(3B), 185 (the unfair burden element is not a statutory claim under s 185).
[596] See Richard Boast & Neil Quigley, "Regulatory Reform and Property Rights in New Zealand" in Susy Frankel (ed) *Learning from the Past, Adapting for the Future: Regulatory Reform in New Zealand* (Wellington: LexisNexis, 2011) at 143; Richard Epstein, *Takings, Givings and Bargains: Multiple Challenges to Limited Government* (Wellington: New Zealand Business Roundtable, 2004) at 6–7.
[597] See *Estate Homes Ltd*, *supra* note 451 at paras 65–66.
[598] *Ibid* at paras 1–4.
[599] *Ibid* at paras 52–54, 66.
[600] *Ibid* at paras 65–67.
[601] See *Town and Country Planning Act 1990* (UK), s 107.
[602] *Ibid* s 115.
[603] *Ibid* s 108 (UK). See also *Bolton v North Dorset District Council* [1997] 74 P & CR 73, [1997] 47 EG 132 (UK)
[604] *Guardians of Paku Bay Association Inc v Waikato Regional Council*, [2012] 1 NZLR 271 at para 65 (HC).
[605] See generally Boast, "Property Rights and Public Law Traditions", *supra* note 461 at 168 (The United Kingdom has a larger population with more privatized land ownership compared to New Zealand, where the government owns most of the land. More landowners may have influenced the creation of compensation for harmed land-use permissions in the United Kingdom).
[606] See Joseph, *supra* note 582 at 426 (The United Kingdom also does not recognize regulatory takings as a claim for compensation).
[607] See *Town and Country Planning Act 1990* (UK), s 107; *Schiavone v Worthing BC*, [2015] EWHC 3516 (QB), [2015] 10 WLUK 809 (UK). Permits in the U.K. are known as *planning permissions*.
[608] See New Zealand Gazette Office, "The New Zealand Gazette: 'land acquired'", online: *gazette.govt.nz* <https://gazette.govt.nz/home/NoticeSearch/?keyword=%22land+acquired%22&year=2020&pageNumber=&noticeNumber=&dateStart=&dateEnd=&noticeType=&act=> (112 notices that land was acquired by agreement in 2020); New Zealand Gazette Office, "The New Zealand Gazette: 'Notice of Intention to Take Land'", online: *gazette.govt.nz* <https://gazette.govt.nz/home/NoticeSearch/?keyword=%22Notice+of+Intention+to+Take+Land%22&year=2020&pageNumber=&noticeNumber=&dateStart=&dateEnd=&noticeType=&act=> (31 Notice of Intention to Take Land in 2020)
[609] See *Wheeler v J J Saunders Ltd*, [1996] Ch 19, [1994] EWCA Civ 32 at 35 (UKCA) (where Peter Gibson LJ "The court should be slow to acquiesce in the extinction of private rights without compensation as a result of administrative decisions which cannot be appealed and are difficult to challenge" at 35); *R & R Fazzolari Pty Ltd*, supra note 485 at 40 (discussing U.K. recognition of common law protections).
[610] See "2020 Land Valuation Tribunal of New Zealand Decisions", online: *NZLII* <http://www.nzlii.org/nz/cases/NZLVT/2020/>; "2019 Land Valuation Tribunal of New Zealand Decisions", online: *NZLII* <http://www.nzlii.org/nz/cases/NZLVT/2019/> (most Land Valuation Tribunal cases involve property in the major cities).
[611] See Transparency International, "Corruption Perception Index: Index 2020", online: *Transparency International* <https://www.transparency.org/en/cpi/2020/index/nzl>; Boast, "Property Rights and Public Law Traditions", *supra*

note 461 at 169–70 (ss 10 and 63 of the *Land Transfer Act 1952* transferred lands from the Crown to the people with unchallengeable ownership.).
[612] See generally Ehrenzeller Bernhard et al (eds), *Die schweizerische Bundesverfassung St. Galler Kommentar*, 3rd ed (Zurich: Dike Verlag, 2014) Art. 10 N 4.
[613] See Bundesverfassung [BV] [Constitution] Dec 31, 1999, SR 101, art 189 Para. 4 (Switz) [BV]; Walter Haller, Alfred Kölz & Thomas Gächter, eds, *Allgemeines Staatsrecht, Eine juristische Einführung in die Allgemeine Staatslehre*, 5th ed (Zürich: Schulthess, 2013) at 314 (Meanwhile canton law and due process issues can have constitutional questions.); Giovanni Biaggini, "Art. 189 Zuständigkeiten des Bundesgerichts" in *BV Kommentar, Bundesverfassung der Schweizerischen Eidgenossenschaft*, 2nd ed. (Zürich, 2017) N 20.
[614] See Paul Mahoney, "The Common Law and Economic Growth: Hayek Might Be Right" (2001) 30 J Legal Stud 503 at 503, 524. See also Courtney Jung, Ran Hirschl & Evan Rosevear, "Economic and Social Rights in National Constitutions" (2014) 62 Am J Comp L 1043 at 1057, 1063–64 (finding that common law systems have property rights while civil law systems "have been associated with state intervention through market regulation and social spending." at 1063–64) (However, the author finds common law countries have less economic rights in their constitution compared to civil law countries; meanwhile civil law countries have more social rights in their constitutions that common law countries. at 1057); Rafael La Porta et al, "The Quality of Government" (1999) 15 J L, Econ, & Org 222 at 261–62.
[615] See Patricia Egli, *Introduction to Swiss Constitutional Law*, 2nd ed (Zürich: Dike Verlag, 2020) S 18.
[616] See John Capowski, "China's Evidentiary and Procedural Reforms, the Federal Rules of Evidence, and the Harmonization of Civil and Common Law" (2012) 47 Tex. Int'l LJ 455 at 464; Matthias Hartwig, "The Institutionalization of the Rule of Law: The Establishment of Constitutional Courts in the Eastern European Countries" (1992) 7 AMUJ Int'l L & Pol'y 449 at 457 (With the Soviet Union being a civil law system, "the result of the socialist theory [is] that all power is concentrated in the soviets, the councils, or parliamentary organs. The idea of checks and balances between and among the organs does not fit within that theory.").
[617] See Egli, *supra* note 615 at 13, 18.
[618] See René Rhinow, "§ 35 Wirtschafts- und Eigentumsverfassung" in: Daniel Thürer, Jean-François Aubert, Jörg Paul Müller, eds, *Verfassungsrecht der Schweiz / Droit constitutionnel Suisse* (Zürich: 2001) at 567–68, 574 [Rhinow, "§ 35 Wirtschafts- und Eigentumsverfassung"]; Biaggini, "Art. 26 Eigentumsgarantie" *supra* note 11 N 5.
[619] See Art 26 BV; Enrico Riva, "Regulatory Takings in American Law and Material Expropriation in Swiss Law - A Comparison of the Applicable Standards" (1984) 16:3 Urban Lawyer 425 at 427 (The version of the swiss constitution that Riva analyzed; Switzerland appears to have removed the property right due process clause from their constitution) [Riva, "Regulatory Takings in American Law"]
[620] BV Art 27
[621] BV art 94
[622] BV art 49 para 1; Egli, *supra* note 615 s 2.
[623] See e.g. Schweizerisches Bundesgericht [BGer] [Federal Supreme Court] May 30, 2001, 127 Entscheidungen des Schweizerischen Bundesgerichts [BGE] I 185 (Switz) (*R v Munizipalgemeinde Staldenried und Kantonsgericht des Kantons Wallis*, BGE 127 I 185) at 185, 188 (the Constitution does exceed the federal guarantee with the use of "fair" compensation instead of "full" compensation). See also Jörg Paul Müller & Markus Schefer, "Siebtes Kapitel: Grundrechte der Eigentums- und Wirtschaftsordnung / I. Eigentumsgarantie (Art. 26 BV) / 3. Einschränkungen der Eigentumsgarantie" in: *Grundrechte in der Schweiz, Im Rahmen der Bundesverfassung, der EMRK und der UNO-Pakte*, 4th ed (Bern: 2008) at 1036–37.
[624] See Andreas Auer, Giorgio Malinverni & Michel Hottelier, *Droit constitutionnel suisse, Volume II: Les droits fondamentaux*, 3rd ed (Bern 2013) at 417.
[625] See Enrico Riva & Thomas Müller-Tschumi, "§ 48 Eigentumsgarantie" in: Daniel Thürer, Jean-François Aubert, Jörg Paul Müller, eds, *Verfassungsrecht der Schweiz / Droit constitutionnel suisse* (Zürich: 2001) s 766 [Riva, "§ 48 Eigentumsgarantie"].
[626] *Ibid* at 765–66.
[627] See Aurélien Wiedler, *La protection du patrimoine bâti, Étude de droit fédéral et cantonal* (Bern: Stämpfli, 2019) at 64–65.
[628] *Ibid* s 66–67.
[629] See Martin Monsch, *Hochfrequenzhandel, Eine rechtsökonomische Analyse des Phänomens sowie eine rechtsdogmatische Betrachtung des schweizerischen Aufsichtsrechts unter funktionaler Berücksichtigung des europäischen Rechts*, (Zürich: 2018) (SSFM 126) s 143–44; BV art 2 para 2, art 94 expressly promoting a welfare state without conflicting with economic freedom. See also Peter Uebersax, "I Droit public : questions choisies / Die

Respektierung der Werte der Bundesverfassung" in: Véronique Boillet, Anne-Christine Favre & Vincent Martenet, eds, *Le droit public en mouvement, Mélanges en l'honneur du Professeur Etienne Poltier* (Geneva: 2020) at 454.
[630] See Riva, "§ 48 Eigentumsgarantie", *supra* note 625 at 765–66.
[631] *Ibid* at 772 (discussing G Müller, *Privateigentum* (Anm. 17) at 61 ff).
[632] See BGer Nov 29, 1979, 105 BGE Ia 330, s 3c at 336; BV art 140 BV (Amendments to the Federal Constitution require a referendum).
[633] See Riva, "§ 48 Eigentumsgarantie", *supra* note 625 at 772
[634] *Ibid* (discussing G. Müller, *Privateigentum* (Anm. 17) at 61 ff). BGer Jan 21, 1976, 102 BGE Ia 104, s 5a at 116; BGer Apr 4, 1973, 99 BGE Ia 604, s III.6e at 627.
[635] See Ivo von Arx, *Grundrechtlicher Eigentumsschutz, Eine rechtsvergleichende Studie* (Zürich: Schulthess Publishing House, 2011) (ZStöR 201) at 128; BGer Mar 2 1979, 105 BGE Ia 134, s 3a at 140–41, 256–57.
[636] See Peter Hänni, *Planungs-, Bau- und besonderes Umweltschutzrecht,* 5th ed (Bern: 2008) at 28–29.
[637] See BGer Mar 2 1979, BGE 105 Ia 134, s 3a at 140–41; Peter Saladin, *Grundrechte im Wandel*, 3rd ed (Bern: 1982) at 366.
[638] See generally Rhinow, "§ 35 Wirtschafts- und Eigentumsverfassung", *supra* note 618 at 573, 576.
[639] See Hänni, *supra* note 636 at 29–30.
[640] See BGer Jun 15, 1976, BGE 102 Ia 243 s 6 at 250, 252.
[641] See von Arx, *supra* note 635; Rhinow, "§ 35 Wirtschafts- und Eigentumsverfassung", *supra* note 618 at 574.
[642] See Regina Kiener, Walter Kälin & Judith Wyttenbach, *Grundrechte*, 3rd ed (Bern: 2018) at 354 [Kiener, *Grundrechte*]
[643] See BGer Oct 24, 2005, 131 BGE II 728 at 730.
[644] See Wiedler, *supra* note 627 at 79; Hans Maurer, *Beschränkung und Lenkung der landwirtschaftlichen Bodennutzung und Entschädigungsfragen*, (URP, 2002) at 616, 626–27.
[645] See Enrico Riva, "Art. 5 Ausgleich und Entschädigung / III. Materielle Enteignung (Abs. 2) / A. - E. / 1. – 2" in: Heinz Aemisegger et al, eds, *Praxiskommentar RPG: Nutzungsplanung* (Zürich: 2016) NN 131–132 [Riva, "Art. 5 Ausgleich und Entschädigung"]
[646] See BGer Jan 25 1993, 119 BGE Ib 124, s 2b–c at128–29 (citing 118 BGE Ib 41, s 2a).
[647] See BGer Nov 18 1981, 107 BGE Ib 380, s 2 at 383–84 (Construction ban to private landowner was worthy of compensation); BGer Jul 5, 1972, 98 BGE Ia 381, s 3 at 387; BGer Nov 29, 1979, 105 BGE Ia 330 at 339.
[648] See BGer Oct 24, 2005, 131 BGE II 728 at 730. See also BGer Mar 4, 1992, 118 BGE Ib 38 at 41; Riva, "Regulatory Takings in American Law", *supra* note 619 at 432.
[649] See BV art 5 para 2.
[650] *Ibid*.
[651] See Reto Patrick Müller & Lea Bachmann, "Treu und Glauben als grundrechtliche Vermögensschutznorm?" (2020) 116 SJZ Magazine 259ff at 267.
[652] *Ibid* 259 ff, 261–62.
[653] See BGer May 11, 1966, 92 BGE I 503, s 2a at 509; Biaggini, "Art. 26 Eigentumsgarantie", *supra* note 11 at N 41
[654] *Supra* 92 BGE I 503, s 2a at 510
[655] Riva, "Regulatory Takings in American Law", *supra* note 619 at 428.
[656] See Jörg Paul Müller & Markus Schefer, "Siebtes Kapitel: Grundrechte der Eigentums- und Wirtschaftsordnung / I. Eigentumsgarantie (Art. 26 BV) / 3. Einschränkungen der Eigentumsgarantie" in: *Grundrechte in der Schweiz, Im Rahmen der Bundesverfassung, der EMRK und der UNO-Pakte*, 4th ed (Bern: 2008) at 1039–40.
[657] See BGer Mar 2, 1979, 105 BGE Ia 134, s 3a at 140. Switzerland recognizes less "bundle of sticks" in their jurisprudence than the United States as fundamental elements of property.
[658] See BV art 29a. See also, René Wiederkehr & Paul Richli, *Praxis des allgemeinen Verwaltungsrechts - Eine systematische Analyse der Rechtsprechung* (Bern: 2012) vol 1 at 658. See generally, Nadine Mayhall, *Aufsicht und Staatshaftung* (Zürich: 2008) at 240.
[659] See André Jomini, "Expropriation formelle : quelques développements récents dans le cadre du droit fédéral / 1.-4" in: Bénédict Foëx & Michel Hottelier, eds, *La garantie de la propriété à l'aube du XXIe siècle, Expropriation, responsabilité de l'Etat, gestion des grands projets et protection du patrimoine* (Geneva: 2009) at 1, 3; BGer Nov 9, 2016, 142 BGE I 162, s 3.3 at 165–66; Jörg Paul Müller & Markus Schefer, "Sechstes Kapitel: Garantien fairer administrativer und gerichtlicher Verfahren / C. Garantien gerichtlicher Verfahren / I. Rechtsweggarantie (Art. 29a und 32 Abs. 3 BV)" in: *Grundrechte in der Schweiz, Im Rahmen der Bundesverfassung, der EMRK und der UNO-Pakte*, 4th ed (Bern 2008).
[660] See BV art 36 para 4.

[661] See BGer Nov 29, 1979, 105 BGE la 330 at 336 ((citing the modern equivalent of the Swiss Constitution Arts 76–78); BGer Nov 14, 1962, 88 BGE I 248 at 253. See also Bundesgesetz über die Enteignung [EntG] [Federal Law on Expropriation] Jun 20, 1930, SR 711 arts 4, 7 (Switz); BGer Apr 23, 2009, 135 BGE I 176 s 7.3 at 185 (small fishing huts of a bygone era have heritage value worth protecting against private interests to build a profitable villa).
[662] See BGer Nov 29, 1979, 105 BGE la 330 at 335, 338–39 (Landowner could not build a farmhouse on agricultural zoned land due to the unascertainable risks to water. Building permits were not allowed under the Water Protection Act for lands, except building zones. at 334–35).
[663] See BV art 108 paras 1–2. This could reduce housing for the local population, forcing the former-homeowner's family to leave the community, displacing the Constitutional objective.
[664] See BGer Mar 16, 1982, 108 BGE Ia 33, s 3a at 35.
[665] See BGer Nov 14, 1962, 88 BGE I 248 at 253 (However, construction of low-cost housing on expropriated land mitigates the rising cost-of-living even though the new government-landlord and the private residents benefit from the expropriation. at 254). See also 48 RO I 601 (Geneva).
[666] *Ibid*.
[667] See BGer Mar 16, 1982, 108 BGE Ia 33, s 3a at 35–36; Georg Müller, "Kommentar zu Art. 22ter BV" in: *Kommentar zur Bundesverfassung der Schweizerischen Eidgenossenschaft vom 29. Mai 1874* (Basel: 1987) N 31.
[668] See BGer Nov 23, 2009, 135 BGE III 633 at 634.
[669] *Ibid* s 3.2 at 635, s 5.1.4–5.1.5 at 638–39.
[670] *Ibid* at 639.
[671] The disruption must be permitted by public law or to the fulfillment of a public task (tourism). The canton zoning regulation (BZR) is the public law allowing unobstructed and safe launching, flying, and landing of hang-gliders. Under Art 679 and 680 of the Swiss Civil Code and the BZR, the landowner must tolerate the statutory restriction on ownership in exchange for compensation, even though the ingress and egress of hang-gliders does not create an implied easement. Compensation is the consequence of the government restricting ownership. *Ibid*.
[672] See Bundesgesetz über den Natur- und Heimatschutz [NGH] [Federal Law on the Protection of Nature and Homeland (Cultural Heritage)] Jul 1, 1966, SR 451 art 6 (Switz); Jörg Leimbacher, "Art. 6 Bedeutung des Inventars" in: Peter Keller, Jean-Baptiste Zufferey & Karl-Ludwig Fahrländer, eds, *Kommentar NHG / Commentaire LPN, Ergänzt um Erläuterungen zu JSG und BGF / Augmenté d'aspects choisis LChP et LFSP*, 2nd ed, (Zürich: 2019) N 21–23.
[673] *Ibid* at N 22.
[674] *Ibid*.
[675] See Arnold Marti, "Art 78" in: Bernhard Ehrenzeller et al, eds, *Die schweizerische Bundesverfassung, St. Galler Kommentar,* 3rd ed (Zürich: Dike Verlag, 2014) N 14. See also Art 78 paras 3, 5 BV.
[676] See BGer Oct 11, 1994, 120 BGE la 227 at 232, 235 (government interreference with the reasonable enjoyment of the property during construction or effect on the rental real estate market did not invoke the right to a legal review).
[677] See BV art 5 para 3. See generally BGer Dec 16, 1987, 113 BGE la 444 at 448, 456 (unsuccessful claim due to a lack of assurances from the landowner and the federal law that authorized the taking cannot be subject to judicial scrutiny, even by the highest federal court).
[678] See EntG art 3; Klaus Vallender, Peter Hettich & Jens Lehne, *Wirtschaftsfreiheit und begrenzte Staatsverantwortung, Grundzüge des Wirtschaftsverfassungs- und Wirtschaftsverwaltungsrechts*, 4th ed (Bern: 2007) at 227 (Communities typically expropriate and pass property rights to designated third parties).
[679] See Kaspar Plüss, *Öffentliche Interessen im Zusammenhang mit dem Betrieb von Flughäfen, Mit besonderer Berücksichtigung von luftverkehrsbedingten Eingriffen in das Eigentum im Bereich des Flughafens Zürich* (Zürich: 2007) (ZStöR 177), at 89–90; Kiener, *Grundrechte*, *supra* note 642 at 360.
[680] See BGer Apr 9, 2001, 1P.36/2001 s 3a – 3c (unpublished opinion).
[681] See BGer Jul 1, 2011, 1C_455/2010 s 4 (unpublished opinion).
[682] *Ibid* s 3.3–3.4; BGer Nov 23, 2009, 135 BGE III 633 s 5.1.4–5.1.5 at 638–39.
[683] See BGer Jul 25, 1986, 112 BGE Ib 280 at 290.
[684] See Bundesgesetzüber Rohrleitungsanlagen zur Beförderungflüssiger oder gasförmiger Brenn- oder Treibstoffe [RLG] [Federal Law on on pipeline systems for the transport of liquid or gaseous fuels] Oct 4, 1963, SR 746.1, art 10; BGer Nov 29, 1979, 105 BGE la 330 at 340.
[685] See Peter Hänni, *Planungs-, Bau- und besonderes Umweltschutzrecht*, 6th ed (Bern: 2016) at 584.
[686] See BGer Jan 25, 1989, 115 BGE Ia 27 at 31; BGer Sept 15, 1988, 114 BGE Ia 114 at 120 (the public interest cannot be satisfied any other way).
[687] See BGer Apr 1, 1987, 113 BGE Ia 126 at 132–33; BGer May 2, 1984, 110 BGE Ia 30 at 33–34.

[688] See BGer Apr 1, 1987, 113 BGE Ia 126 at 134. See also Pierre Moor, Alexandre Flückiger & Vincent Martenet, *Droit administratif, Volume I: Les fondements*, 3rd ed (Bern: 2012) at 818–20.
[689] See EntG art 13; BGer Mar 9, 1977, 103 BGE Ib 91 at 98–99.
[690] *Ibid* at 99.
[691] See BGer Sept 15, 1988, 114 BGE Ia 114 at 123.
[692] *Ibid* at 120, 123.
[693] See Bundesverwaltungsgericht [BVGE] [Federal Administrative Court] Dec 11, 2009, A-2013/2006 s 10.3 (unpublished opinion).
[694] See BGer Sept 15, 1988, 114 BGE Ia 114 at 120. *Contra* BGer Oct 20, 1971, 97 BGE I 792 at 798, 799, 806–07 (If the landowner developed its property and created the need for additional parking space because more people are parking on the street solely to visit the landowner's business and apartment complex, then the landowner should bear the burden of the new private need. The government can increase the property tax if there's immediate parking around the commercial property or charge a replacement tax to the landowner who created the need for more parking spaces. The replacement tax is not punitive, but partially compensates the public for fulfilling the landowner's public burden to create more cheap parking. The government cannot charge one landowner a tax to pay for a new parking garage). *Cf KMS Retail Rowlett, LP v Rowlett (City of)*, 593 SW (3d) 175 at 189, 192–93 (Tex Sup Ct 2019), reh'g denied (Oct 4, 2019) (A landowner's land was expropriated to provide a second driveway for a neighboring business. Although the neighbor benefited the most and was responsible for traffic circulation, the expropriation was not solely a private benefit – i.e., less clogged roads in densly populated areas).
[695] See BGer Oct 5, 1977, 103 BGE Ia 417 at 425–46.
[696] See BGer May 2, 1984, 110 BGE Ia 30 at 34–35; BGer Jun 15, 1976, 102 BGE Ia 243 at 249 (the rationale behind the proportionality principle is to protect citizens against excessive state interference.).
[697] See Bundesgesetzüber die Raumplanung [RPG] [Federal Act on Spatial Planning] Jun 22, 1979, SR 700, art 3 para 2(a) (Switz).
[698] See BGer Sept 15, 1988, 114 BGE Ia 114 at 118, 125.
[699] *Ibid* at 118.
[700] *Ibid* at 119, 125–127 (Government expropriation has substantial burdens of proof compared to rezoning private property for private individuals. The municipality violated the constitutional right to property and protection against arbitrary government conduct. The government must exercise their review powers to prevent a denial of the landowner's rights through the zoning plan).
[701] See BGer Nov 29, 1979, 105 BGE la 330 at 343–344 (29 Nov 1979). See e.g. BGer Sept 24, 1975, 101 BGE Ia 224 at 227.
[702] See BGer Sept 21, 1976, 102 BGE la 331 at 336.
[703] See e.g. BGer Jun 3, 1977, 103 BGE Ib 210 at 222, 226, rev'd on other grounds 111 BGE Ib 81 (Appraisal committee for the expropriation knew compensation was required and offered concessions instead); BGer Jun 24, 1997, 123 BGE II 425 at 428 (confirming the municipality's attempt to avoid paying compensation in 103 BGE Ib 210 as a justification for administrative law appeals).
[704] See generally BGer Sept 24, 1975, 101 BGE Ia 224 at 227.
[705] See BGer May 30, 2001, 127 BGE I 185 at 190–192.
[706] *Ibid* at 190–191.
[707] *Ibid*.
[708] *Ibid* at 191–92 (no surcharges for emotional distress or affected ties to property because the government did not take land ownership); Klaus Vallender & Peter Hettich, "Art. 26" in Bernhard Ehrenzeller et al, eds, *Die schweizerische Bundesverfassung*, *St. Galler Kommentar*, 3rd ed (Zürich: Dike Verlag, 2014) N 74–75.
[709] See BGer May 20, 2001, 127 BGE I 185 E. 4 S. 191–92, ss 5a at 193; Müller & Schefer, *supra* note 623 at 1036–37.
[710] See RPG Art 5 para 2; BGer May 30, 2001, 127 BGE I 185, s 5b at 193.
[711] *Ibid* at 193–194; Vallender, *supra* note 708.
[712] See BV art 27 (Right to Economic Freedom); art 94 (Principles of the Economic System).
[713] See BV art 27.
[714] See BV art 94 paras 2–3.
[715] See BV art 94 para 3; OECD Observer, "Competition Law and Policy in Switzerland" (March 2006), online (pdf): *Policy Brief* <http://www.oecd.org/competition/36386974.pdf> at 4.
[716] See BV art 94 para 2; BGer Feb 27, 1998, 124 BGE I 25 at 31.
[717] See BGer Nov 27, 2003, 130 BGE I 26 at 43.
[718] See BGer Dec 16, 1987, 113 BGE la 444 at 448.

[719] See BGer Nov 2, 1999, BGE 125 I 417 at 422 (the constitutional objective is competitive neutrality). See e.g. BGer Jul 4, 1997, 123 Arrêts du Tribunal Fédéral Suisse [ATF] I 212 at 217 (Switz); BGer Jun 12, 1996, 122 BGE I 130 at 133.
[720] See BGer Nov 2, 1999, 125 BGE I 417 at 422; BGer Nov 27, 2003, 130 BGE I 26 at 40, 43.
[721] See BGer Jul 11,1937, 63 ATF I 213 at 219 (Valais banned companies from using machine excavators instead of human labor was unconstitutional).
[722] See Markus Rüssli, "Constitutional Protection of Economic Liberties in Switzerland and the United States" (2003) 18 Tul Eur & Civ LF 39 at 44.
[723] See generally BGer Jan 30, 1998, 124 BGE I 11 at 14–16.
[724] See Wiedler, *supra* note 627 at 81–82; Johannes Reich, *Grundsatz der Wirtschaftsfreiheit, Evolution und Dogmatik von Art. 94 Abs. 1 und 4 der Bundesverfassung der Schweizerischen Eidgenossenschaft vom 18. April 1999*, (Zürich: Dike Verlag, 2011) at 93.
[725] See BV art 94 para 1; Auer, *supra* note 624 at 421.
[726] See Vincent Martenet, "II L'État et les acteurs privés / L'État en concurrence avec le secteur privé" in: Véronique Boillet, Anne-Christine Favre & Vincent Martenet, eds, *Le droit public en mouvement, Mélanges en l'honneur du Professeur Etienne Poltier*, (Geneva: 2020) at 679. See also, Klaus Vallender, "Art 27" in: Bernhard Ehrenzeller et al, eds, *Die schweizerische Bundesverfassung*, *St. Galler Kommentar*, 3rd ed, (Zürich: Dike Verlag, 2014) N 47 (Economic Freedom cannot be a defense for foreigners or aliens without a permanent residence permit).
[727] See Vallender, *supra* N 45.
[728] See BGer Dec 16, 1986, 112 BGE Ia 382, s 5b at 387–88.
[729] *Ibid*.
[730] See Wiedler, *supra* note 627 at 83; Bernhard Ehrenzeller & Walter Engeler, eds, *Handbuch Heimatschutzrecht, Internationales, nationales und kantonales Recht - Mit einer Kommentierung des Rechts der Bau- und archäologischen Denkmäler des Kantons St. Gallen* (Zürich: Dike Verlag, 2019) at 248–49; BGer May 6, 1994, 120 BGE Ia 126 s 4c at 133.
[731] See BGer Dec 10, 2004, 131 BGE I 223, s 4.2 at 231.
[732] See BGer May 6, 1994, 120 BGE Ia 126, s 4e(dd) at 139.
[733] See Raphaël Mahaim, *Le principe de durabilité et l'aménagement du territoire, Le mitage du territoire à l'épreuve du droit : utilisation mesurée du sol, urbanisation et dimensionnement des zones à bâtir* (Zürich: Schulthess Publishing House, 2014) at 429.
[734] See generally Peter Kunz, *Wirtschaftsrecht, Grundlagen und Beobachtungen* (Bern: Stämpfli, 2019) at 903.
[735] See e.g. BGer Nov 23, 2009, 136 BGE I 29 s 3.2 at 33.
[736] See BGer Dec 10, 2004, 131 BGE I 223 s 4.1 at 231.
[737] See Giovanni Biaggini, "Art. 27 Wirtschaftsfreiheit" in *BV Kommentar, Bundesverfassung der Schweizerischen Eidgenossenschaft*, 2nd ed (Zürich: 2017) N 29 [Biaggini, "Art. 27 Wirtschaftsfreiheit"]
[738] See BV Art 36 para 4.
[739] See generally BV art 36; BGer Feb 12, 1997, 123 BGE I 12 s 2 at 15; BGer Apr 29, 1998, 124 BGE I 107 s 3b at 113.
[740] See Tribunal Fédérale [TF] Jan 27, 2005, 1P.160 / 2004 / ggs s 8.2. See e.g. TF Apr 13, 2005, 2P.244 / 2004 / sza s 4.1 (the government should have studies and reports substantiating the necessity of the economic regulation that barred vendor sales of eye care products for adolescent use without an ophthalmologist's consent.)
[741] See Pierre Tschannen, *Staatrecht der Schweizerischen Eidgenossenschaft*, 4th ed (Bern: Stämpfli, 2016) art 8 para 10, art 9 paras 38–39. *Contra* BGer Oct 12, 2012, 139 BGE I 16 (European Convention of Human Rights must be enforced without federal law conflicts; Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* (West Group, 2012) ch 27 (The Harmonious Reading Canon)).
[742] See Giovanni Biaggini, "Art. 36 Einschränkungen von Grundrechten" in *BV Kommentar, Bundesverfassung der Schweizerischen Eidgenossenschaft*, 2nd ed (Zürich: 2017) N 3.
[743] *Ibid* at N 27.
[744] See BGer May 8, 1992, 118 BGE Ib 241 s 5g at 253–54. See also Arrêt de la Ile Cour administrative du Tribunal cantonal de Fribourg [Judgement of the Third Administrative Court of the Cantonal Court of Fribourg] Jul 27, 2020, 603 2020 39 para 5.4.2.
[745] See BGer May 8, 1992, 118 BGE Ib 241 s 6c at 255.
[746] *Ibid*.
[747] See BV art 27 para 2.
[748] See TF Jan 27, 2005, 1P.160 / 2004 / ggs s 2.2 (zoning as a pretext to prohibit free-market competition is not protected).

[749] See BV arts 27, 31; BGer Jan 21, 1976, 102 BGE Ia 104 at 116.
[750] See BGer Apr 4, 1973, 99 BGE Ia 604 at 618.
[751] See BGer Jan 21, 1976, 102 BGE Ia 104 at 116
[752] *Ibid*.
[753] See BGer Dec 12, 1984, 110 BGE Ia 167 s 7bb at 174; Kiener, *Grundrechte*, *supra* note 642 at 397.
[754] See BGer Jan 15, 2010, 1C_229/2009 ss 4, 4.3 (unpublished opinion); BGer Jan 21, 1976, 102 BGE Ia 104 s 5a at 116.
[755] See BGer Nov 9, 2016, 142 BGE I 162 ss 3.7.2–3.7.3 at 170–71.
[756] *Ibid*.
[757] See BGer Jan 21, 1976, 102 BGE Ia 104 s 5a at 116; BGer Apr 4, 1973, 99 BGE Ia 604 s II.4d at 618.
[758] See BGer Apr 4, 1973, 99 BGE Ia 604 s II.4d at 618.
[759] See Biaggini, "Art. 27 Wirtschaftsfreiheit" *supra* note 737 N 17. E.g. BGer May 8, 1992, 118 BGE Ib 241 s 5b at 249, s 5d at 250, s 5e at 251.
[760] See Biaggini, "Art. 26 Eigentumsgarantie" *supra* note 11 N 25; BV art 94.
[761] See Biaggini, "Art. 26 Eigentumsgarantie" *supra* note 11 N 25; BV art 94.
[762] See, generally, Peter Hänni, *Planungs-, Bau- und besonderes Umweltschutzrecht*, 6th ed (Bern: 2016) at 589.
[763] See BV art 8.
[764] See BGer Nov 23, 2009, 136 BGE I 17 s 5.3 at 29.
[765] See BV art 30 para 1 (Federal Right); Regina Kiener, "Judicial Independence in Switzerland" in Anja Seibert-Fohr, ed, *Judicial Independence in Transition* (Berlin: Springer, 2012) 403 at 405 (discussing how Canton Constitutions have a right to impartial judges) [Kiener, "Judicial Independence in Switzerland"]
[766] See BV art 146; Kiener, "Judicial Independence in Switzerland", *supra* note 765 at 430.
[767] See Kiener, "Judicial Independence in Switzerland", *supra* note 765 at 427–28, 430.
[768] See BGer Nov 10, 1982, 108 BGE Ib 352 s 4a at 355.
[769] See BGer Oct 13, 1965, 91 BGE I 329 s III.3 at 339; Riva, "Art. 5 Ausgleich und Entschädigung", *supra* note 645 N 160.
[770] See Michael Lips & Evelyn Frei, "Federal Supreme Court decision on compensation due to limitation of secondary homes" (16 Nov 2018), online: *International Law Office* <https://www.internationallawoffice.com/Newsletters/Real-Estate/Switzerland/Pestalozzi-Attorneys-at-Law-Ltd/Federal-Supreme-Court-decision-on-compensation-due-to-limitation-of-secondary-homes> (discussing BGer Aug 6, 2018, 1C_216/2017)
[771] See Mahaim, *supra* note 733 at 434, 447.
[772] See Arrêt de la Ile Cour administrative du Tribunal cantonal de Fribourg [Judgement of the Third Administrative Court of the Cantonal Court of Fribourg], Apr 2, 2019, 602 2018 81 s 4.2.4.
[773] See Mahaim, *supra* note 733 at 437 (the landowner will have difficulty disproving the municipality's justification for allocating zones, especially the canton's constitutional zoning power under Art. 75 of the Swiss Constitution).
[774] See generally BGer Mar 6, 2019, 5A_946/2018 s 2.3; Giovanni Biaggini, "Art. 8 Rechtsgleichheit" in *BV Kommentar, Bundesverfassung der Schweizerischen Eidgenossenschaft*, 2nd ed (Zürich: 2017) N 8.
[775] *Ibid*. BV Art 146 (The State is liable for its actors when the exercise unlawful activities causing damages to third parties: i.e., landowners).
[776] See Tanquerel Thierry, *Manuel de droit administratif*, 2nd ed (Geneva: 2018) at 587.
[777] See generally Rainer Schweizer, "2. Titel: Grundrechte, Bürgerrechte und Sozialziele / 1. Kapitel: Grundrechte / Vorbemerkungen zu Art. 7-36" in: Bernhard Ehrenzeller, eds, *Die schweizerische Bundesverfassung, St. Galler Kommentar*, 3rd ed, (Zürich: 2014) N 34.
[778] *Ibid*.
[779] See Diego Weder & Anna Bussmann, "Die Mehrwertabgabe: Umsetzung der Bestimmungen des Bundesgesetzes über die Raumplanung zur Mehrwertabgabe in den Kantonen" (2019) 4 *Expert Focus* 338 at 338–39.
[780] *Ibid* at 339–40.
[781] See RPG art 5 paras 1^{bis}, $3^{1sexies}$.
[782] See Weder, *supra* note 779 at 338–40.
[783] See BGer Oct 18, 1967, 93 BGE I 557 [Wettingen]; BGer Sept 17, 1969, 95 BGE I 453 at 455 [Köniz I].
[784] See RPG art 5 1^{bis}.
[785] See Daniel Donauer, Philipp Husi & Christian Eichenberger, "Die Mehrwertabschöpfung gemäss Art. 5 des Raumplanungsgesetzes" *Jusletter* (10 December 2018) at 7.

[786] See BGer Aug 16, 2017, 143 BGE II 568 at 568, 578, 586 (An exemption can only apply to cases of little importance and minute amounts, not a CHF 100,000 exemption). BGer Nov 16, 2016, 142 BGE I 177 at 178, 184–85 (A municipality can unilaterally levy a value added tax if the canton does not fulfill its legislative mandate).
[787] See RPG art 5 para $3^{1quinquies}$ (the municipality must pay the tax or costs of collecting the tax outweighs the expected tax revenue).
[788] Compare to the United States that lacks rezoning taxes. The appreciation, if any, is included in the capital gain of the property after a realization event. John Bourdeau et al, *Corpus Juris Secundum* (Thomson Reuters, 2021) vol 85 s 1867 (WL). *Contra Maisel v. Montgomery Cty*, 94 Md App 31 at 33 (1992) (Maryland Counties did charge a tax for rezoning the property to a more intensive use, but the landowners requested the rezoning); Edward Ziegler, Jr, *Rathkopf's The Law of Zoning and Planning*, 4th ed by Arden Rathkopf, Daren Rathkopf & Edward Ziegler, Jr (Thomson Reuters, 2020) vol 3 s 38:12 (A government-initiated rezoning, allowing a more intensive use, is untaxed in the United States); *Montgomery Cty v Fulks*, 65 Md App 227 at 228, 236 (1985) (A real estate transaction was the realization event for the county rezoning tax, but the rezoning tax exempt the sellers from paying the state agricultural transfer tax).
[789] See Sara Bronin & Dwight Merriam, *Rathkopf's The Law of Zoning and Planning*, 4th ed by Arden Rathkopf, Daren Rathkopf & Edward Ziegler, Jr (Thomson Reuters, 2020) vol 3 s 41:5. See e.g. *Kirstein v Montgomery Cty*, Misc No. 83, 1976 WL 1430 (Md Tax Ct, Sept. 8, 1976) (WL) (quoting the County Council of Montgomery County, "The rationale for the tax is that rezoning of property to a more intensive use will increase the value of the property" at *3).
[790] See BV art 26 para 2; RPG art 5 para 2; EntG art 19; Müller, *supra* note 623 at 1036–37.
[791] See BGer May 30, 2001, 127 BGE I 185 at 192–94.
[792] See EntG arts 17, 21.
[793] See EntG arts 16, 18.
[794] See BGer Dec 13, 1977, 103 BGE Ib 293 at 294–95.
[795] See BGer Apr 1, 2015, 141 BGE I 113 at 119–20.
[796] See EntG art 18 para 1; Arnold Marti, *Grundsätze und Begriffe: Formelle und materielle Enteignung, volle Entschädigung* (2015) 3 BlAR 141ff at 152. See also BGer Sept 25, 2002, 128 BGE II 368 s 4.1–4.2 at 376–377. Raphaël Eggs, *Les 'autres préjudices' de l'expropriation, L'indemnisation au-delà du modèle fondé sur la valeur vénale* (Zürich: Schlthess Publishing House, 2013) at 412–413 (replacement property has applied in cases where the taking was temporary).
[797] See BGer Apr 1, 2015, 141 BGE I 113 at 119–20; BVGE Mar 12, 2019, dA-4784/2018 ss 5, 7.3, aff'd, in part, 1C_219/2019 (unpublished opinion).
[798] See EntG arts 102 para 1(a)–(b); 105(1). See also Ulrich Häfelin, Georg Müller & Felix Uhlmann, *Allgemeines Verwaltungsrecht*, 7th ed (Zürich: Dike Publishing 2016) at 545; Franz Kessler Coendet, *Fachhandbuch Verwaltungsrecht*, ed by Giovanni Biaggini et al (Zurich: Schulthess Publishing House, 2015) at 1111.
[799] See BGer Dec 6, 1994, 120 BGE Ib 496 s 6c at 502.
[800] See BGer Apr 28, 1995, 121 BGE II 121 at 125.
[801] See EntG arts 102 para 1(c); 105(2). See also Häfelin, *supra* note 798 at 545; Marco Borghi, "Die Rückforderung enteigneter Grunstücke: ein missachtetes Recht" (1995) 3 BR/DC 59 at 72
[802] See BGer Aug 16, 1994, 120 BGE Ib 276 at 276, s 7 at 280.
[803] See EntG art 104.
[804] See Borghi, *supra* note 801 at 59–60.
[805] See generally BGer Aug 16, 1994, 120 BGE Ib 276 s 8 at 280.
[806] See Borghi, *supra* note 801 at 60.
[807] See EntG art 106; BGer Dec 6, 1994, 120 BGE Ib 496 s 6c(aa) at 502. See also Lee, *supra* note 554 at *16 (expropriator must remove business fixtures to not prejudice the landowner).
[808] See EntG art 106; Thierry, *supra* note 776 at 609.
[809] See EntG Art 106 para 2; Thierry, *supra* note 776 at 609.
[810] See BGer Aug 16, 1994, 120 BGE Ib 276 s 9d at 284 (paying an inflation adjustment would allow the expropriator to profit, contravening the institute of retrocession (right to recovery) at 284). See also Franz Kessler Coendet, *supra* note 798 at 1111.
[811] See EntG art 102(1)(a), (c). A landowner may seek a declaratory judgment to have the expropriation agreement's express right to recovery apply in the future when the property is not or no longer used. BGer Apr 4, 1973, 99 BGE Ib 267 s 2c at 275, s 5b s 279, s 6b at 283 (this establishes the legal relationship when the right to reclaim is exercised and that the expropriated person received compensation). *Contra* Häfelin, *supra* note 798 at 545 (taking

property for precautionary purposes, with no intention of using it, violates the proportionality principles and may be disallowed.)

[812] See Bernhard Waldmann & Peter Hänni, "2. Tatbestand der materiellen Enteignung" in *Raumplanungsgesetz, Bundesgesetz vom 22. Juni 1979 über die Raumplanung (RPG)* (Bern: 2006) N 56; BGer Jun 7, 1996, 122 BGE II 326 s 6 at 33; BGer Sept 17, 1997, 123 II 481 s 6b at 488, 490.

[813] See BGer Jun 7, 1996, 122 BGE II 326 s 6 at 333 (Non-zoning land can receive compensation if the landowner cannot develop on the land after investing considerable costs in that development before the change and the property already complies with water protection and the general sewerage project); BGer Sept 17, 1997, 123 BGE II 481 s 6b at 488; BGer Sept 28, 1995, 121 BGE II 417 s 4 at 423.

[814] See BGer Jan 25, 1993, 119 BGE Ib 124 s 2d at 130.

[815] See BGer Jun 7, 1996, 122 BGE II 326 s 6 at 333.

[816] See BGer Apr 18, 2006, 132 BGE II 218 s 2.3–2.3.4 at 221–22.

[817] See BGer Jun 7, 1996, 122 BGE II 326 at 326, 335.

[818] *Ibid* at 326, 334–35.

[819] See Riva, "Regulatory Takings in American Law", *supra* note 619 at 425, 431. *Ibid* at 333.

[820] Known as "generellen Kanalisationsprojekt (GKP)"; See BGer Jun 16, 1999, 125 BGE II 431 s 4a at 434, s 5d at 438; See generally BGer Nov 4, 1996, 122 BGE II 455 s 4 at 457.

[821] *Ibid*; Compliance with the public interest of water protection under the Swiss Constitution Art 76 [BV art 76].

[822] See BGer Jun 7, 1996, 122 BGE II 326 at 326, 333. See also, BGer Nov 4, 1996, 122 BGE II 455 s 4 at 457; RPG art 36 para 3 ("Provided no building zones exist, and cantonal law does not provide otherwise, areas that are already largely built up shall be deemed to be provisional building zones."); BGer Sept 28, 1995, 121 BGE II 417 s 4 at 424 (defining the term "built-up" for the Spatial Planning Act).

[823] See Riva, "Art. 5 Ausgleich und Entschädigung", *supra* note 645 NN 160–61; BGer Sept 14, 1988 114 BGE Ib 305 ss 2a, 2b ff at 308–09; BGer Nov 29, 1979, 105 BGE Ia 330 s 3d at 338 (the courts will consider the expropriation-like effect of property limitions associated with a zoning plan).

[824] See Bernhard Waldmann & Peter Hänni, "3. Rechtsfolge: Volle Entschädigung" in *Raumplanungsgesetz, Bundesgesetz vom 22. Juni 1979 über die Raumplanung (RPG)* (Bern: 2006) NN 76, 81; Enrico Riva, "Art. 5 Ausgleich und Entschädigung / III. Materielle Enteignung (Abs. 2) / F. Entschädigung" in Heinz Aemisegger et al, eds, *Praxiskommentar RPG: Nutzungsplanung*, (Zürich: 2016) N 236.

[825] See Ruth Moser & Ueli Straub, "Swiss land governance: a study commissioned by SDC agriculture and food security network" (Lindau, CH: AGRIDEA, 2016) at 23, online (pdf): *Schweizerische Eidgenossenschaft* <https://www.shareweb.ch/site/Agriculture-and-Food-Security/focusareas/Documents/land_f2f_2016_country_study_switzerland.pdf>

[826] *Ibid*.

[827] See BGer Dec 12, 1979, 105 BGE Ib 338 at 341; EntG art 9; BGer Jun 12, 1979, 105 BGE Ib 94 at 96–97.

[828] See Bernhard Waldmann & Peter Hänni, "Artikel 16" in *Raumplanungsgesetz, Bundesgesetz vom 22. Juni 1979 über die Raumplanung (RPG)* (Bern: 2006) N 4.

[829] Raumplanungsverordnung [RPV] [Spatial Planning Ordinance] Jun 28, 2000, SR 700.1, art 30 paras (1)–(2) (Switz).

[830] See RPG art. 16(1).

[831] See Bernhard Waldmann & Peter Hänni, "Artikel 16" in *Raumplanungsgesetz, Bundesgesetz vom 22. Juni 1979 über die Raumplanung (RPG)* (Bern: 2006) N 8.

[832] The translation of "Elastizität des Eigentums". This Theory has not been opined elsewhere in a Federal Tribunal case search (www.bger.ch).

[833] See BGer Mar 2, 1979, 105 BGE Ia 134 at 143.

[834] See Adrian Schneider, *Der angemessene Ausgleich für erhebliche Planungsvorteile nach Art. 5 Abs. 1 RPG* (Zürich: Schulthess, 2006) at 66.

[835] *Ibid* at 68.

[836] See RPG art 5 s 1^{bis}.

[837] See BGer Mar 31, 1995, 121 BGE II 138 at 142–43. See generally Schneider, *supra* note 834 at 168, 183–84; Enrico Riva, "Art. 5-I.-II" in: Heinz Aemisegger et al, eds, *Kommentar zum Bundesgesetz über die Raumplanung / Commentaire de la Loi fédérale sur l'aménagement du territoire* (Zürich: 1999) N 79, 81.

[838] See generally BGer Mar 31, 1995, 121 BGE II 138 at 142–43.

[839] See BGer Mar 2, 1979, 105 Ia 134 at 145 (the nature of the value added tax does not provide any compelling computation about the cost of the special zoning benefit). See generally BGer Mar 31, 1995, 121 BGE II 138 at 143–44; BGer Nov 16, 2016, 142 BGE I 177 at 186; Epstien, "Takings", *supra* note 47 at 52-53.

[840] See BGer Nov 16, 2016, 142 BGE I 177 at 186.
[841] See *Penn Cent Transp Co v New York (City of)*, 438 US 104 at 123 (1978).
[842] See BGer Nov 16, 2016, 142 BGE I 177 at 186 (the Canton relies on Municipal Act; SGS 180 § 152 to levy an value added tax).
[843] See BGer Mar 2, 1979, 105 BGE Ia 134 at 143.
[844] See BGer Aug 6, 2018, 144 BGE II 367 at 374.
[845] See Verwaltungsgerichtdes Kantons Zürich, Oct 23, 2003, VR.2003.00001 s 4b(bb)
[846] See Hänni, *supra* note 636.
[847] See Frances Thomson, "Expropriations of Private Property for Economic 'Development' in the United States: Re-Thinking the Titling and Rule of Law Solutions to Land Grabs in the Global South" (2020) 22:2 Revista Estudios Socio-Jurídicos 1, online: *Revista Estudios Socio-Jurídicos* <https://revistas.urosario.edu.co/xml/733/73363708003/index.html>.
[848] See Mahoney, *supra* note 614 at 503, 524; Jung, *supra* note 614 at 1057, 1063–64; La Porta, et al, *supra* note 619 at 261–62.
[849] See EntG art 19(a^{to}) (cross referencing Bundesgesetzüber das bäuerliche Bodenrecht [BGBB] [Federal law on Rural Land Law] Oct 4, 1991, SR 211.412.11, rt. 66 para 1 (Switz)).
[850] See Der Bundesrat & Generalsekretariat, Press Release, "Bundesrat setzt revidiertes Enteignungsgesetz per 1. Januar 2021 in Kraft" (19 August 2020), online: *Schweizerische Eidgenossenschaft* <https://www.admin.ch/gov/de/start/dokumentation/medienmitteilungen.msg-id-80108.html>; EntG art 19(a^{to}).
[851] See *The Constitution of the Republic of Singapore* (1985 Rev Ed) art 19B; Charissa Yong, "Parliament passes changes to elected presidency", *The Straits Times* (10 November 2016), online: *The Straits Times* <https://www.straitstimes.com/singapore/parliament-passes-changes-to-presidency> (The Singaporean Parliament amended their constitution, without a democratic vote, to limit presidential candidates based on ethnicity). See also Vivienne Tay, "Online sentiments surrounding Halimah Yacob's presidential walkover" (12 September 2017) <https://web.archive.org/web/20170912093741/http://www.marketing-interactive.com/online-sentiments-surrounding-halimah-yacobs-presidential-walkover/>; Albert, *supra* note 166 at 223 (referencing Donald S. Lutz, *Principles Of Constitutional Design*); Lorenz, *supra* 452 at 358–59; Jörg Paul Müller & Schefer Markus, "Sechstes Kapitel: Garantien fairer administrativer und gerichtlicher Verfahren / C. Garantien gerichtlicher Verfahren / I. Rechtsweggarantie" in *Grundrechte in der Schweiz, Im Rahmen der Bundesverfassung, der EMRK und der UNO-Pakte*, 4th ed, (Bern: Stämpfli, 2008); Hogg, *supra* note 448 s 12.1.
[852] See Barbara Van Arsdale et al, *supra* note 102 vol 16 s 4; James Wilson, "Speech to the Pennsylvania Convention" in Jonathan Elliot, ed, *The Debates on the Adoption of the Federal Constitution of the United States* (New York: Lenox Hill Pub & Dist Co, 1888) vol 2 at 432; The Federalist No. 78 (Alexander Hamilton); Raymond Ku, "Consensus of the Governed: The Legitimacy of Constitutional Change" (1995) 64 Fordham L Rev 535 at 557.
[853] See Braver, *supra* note 170 at 872.
[854] Switzerland requires a referendum in each state while U.S. look to a supermajority of the state legislatures to pass the amendment without alterations. "Constitutional Amendment Procedures" (September 2014), online (pdf): *International Institute for Democracy and Electoral Assistance* <https://constitutionnet.org/sites/default/files/constitutional_amendment_procedures.pdf>; Brenda Erickson, "Amending the U.S. Constitution" (August 2017) 25:30 LegisBrief, online: *National Conference of State Legislatures* <https://www.ncsl.org/research/about-state-legislatures/amending-the-u-s-constitution.aspx> (citing Art. V of the U.S. Constitution).
[855] See John Dinan, "Patterns of Subnational Constitutionalism in Federal Countries" (2008) 39 Rutgers LJ 837 at 841–47.
[856] See Bruce Cain & Roger Noll, "Malleable Constitutions: Reflections on State Constitutional Reform" (2009) 87 Tex L Rev 1517 at 1524.
[857] See Tom Ginsburg & Eric Posner, *Subconstitutionalism* (2010) 62 Stan L Rev 1583 at 1593, 1606–11 (the three states are North Dakota, Minnesota, and Montana) (citing Bruce Cain & Roger Noll, "Malleable Constitutions: Reflections on State Constitutional Reform" (2009) 87 Tex L Rev 1517) ("A high threshold for amendment helps ensure that changes to the fundamental structures are accomplished only with the approval of the principal, or a large component" at 1593) (Even a unitary state that decentralizes with regions hold constitutions, such as Mexico, has frequent subconstitutional amendments because amending the lower governments is easier, with rates of amendments exceeding most U.S. states.); G. Alan Tarr, *Understanding State Constitutions* (Princeton, New Jersey: Princeton U Press, 1998) at 23 ("American states have regularly revised and amended their constitutions. Only nineteen states still retain their original constitutions, and a majority of states have established three or more" at 23).
[858] See Ginsburg, *supra* 1606.

[859] See Robert Williams, "Evolving State Constitutional Processes of Adoption, Revision, and Amendment: The Path Ahead" (2016) 69 Ark L Rev 553 at 554.
[860] See Braver, *supra* note 170 at 872, 879 (2016); Joseph Nicholson, *The Debates And Proceedings in the Congress of the United States, Seventh Congress,* (Washington DC: Gales & Seaton, 1851) at 823–24.
[861] See e.g. Tara Leigh Grove, "The Lost History of the Political Question Doctrine" (2015) 90 NYUL Rev 1908 at 1968.
[862] See Erwin Chemerinsky, "The Price of Asking the Wrong Question: An Essay on Constitutional Scholarship and Judicial Review" (1984) 62 Tex L Rev 1207 at 1231–32; Lea Brilmayer, "The Jurisprudence of Article III: Perspectives on the 'Cases or Controversies' Requirement" (1979) 93 Harv L Rev 297 at 304 (if the legislature attempted make all their activities constitution, the legislature would risk-adverse becoming countermajoritan to satisfying the role of both creator and adjudicator).
[863] See Braver, *supra* note 170 at 873.
[864] See Hogg, *supra* note 448 s12.3(a); Ruth Sullivan, *Sullivan, Sullivan and Driedger on the Construction of Statutes*, 4th ed (Canada: LexisNexis Canada, 2002) 275–280 (under the doctrine of implied repeal, the later-in-time statute impliedly repeals the earlier statute to the extent the older statute is inconsistent.)
[865] See *Lindsay v E Bay St Comm'rs*, 2 SCL 38, 61–62 (SC Const App 1796), Waties, J concurring ("the judges claim no judicial supremacy; they are only the administrators of the public will. If an act of the legislature is held void, it is not because the judges have any control over the legislative power, but because the act is forbidden by the constitution, and because the will of the people, which is therein declared, is paramount to that of their representatives, expressed in any law" at 61–62).
[866] See Scott Gant, "Judicial Supremacy and Nonjudicial Interpretation of the Constitution" (1997) 24 Hastings Const LQ 359 at 368; Timothy MacDonnell, "Justice Scalia's Fourth Amendment: Text, Context, Clarity, and Occasional Faint-Hearted Originalism" (2015) 3 Va J Crim L 175 at 182, 184 (a judge who does not add anything more is text of the constitution is not legislating from the bench); *Omaha (City of) v Kramer* 25 Neb 489, 41 NW 295, 296 (1889).
[867] See Ginsburg, *supra* 857 at 1599–600; Peter Suber, *The Paradox of Self-Amendment: A Study of Logic, Law, Omnipotence, and Change* (Peter Lang Inc, 1990) at 236.
[868] Braver, *supra* note 170 at 882 (ideological shift in the US Supreme Court opened the door to counter-interpretations); Richard Albert, "Constitutional Amendment by Constitutional Desuetude" (2014) 62 Am J Comp L 641 at 643 (quoting Arthur Bonfield, "The Abrogation of Penal Statutes by Nonenforcement" (1964) 49 Iowa L Rev 389 at 394).
[869] See *Kramer*, *supra* note 107.
[870] See Rachel E. Barkow, "More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy" (2002) 102 Colum L Rev 237 at 328–29; Adam Lamparello, "Restoring Constitutional Equilibrium" (2014) 39 U Dayton L Rev 229 at 241–42; Adam Lamparello, "Justice Kennedy's Decision in Obergefell: A Sad Day For The Judiciary" (2015) 6 Houston L Rev: Off the Record 45 at 51; Lee Epstein, William Landes & Richard Posner, "Are Even Unanimous Decisions in the United States Supreme Court Ideological" (2012) 106:2 Nw UL Rev 699 at 700.
[871] See Thio Li-ann, *A Treatise on Singapore Constitutional Law* (Academy Publishing, 2012) at 544–46; Thio Li-ann, "'It Is A Little Known Legal Fact': Originalism, Customary Human Rights Law and Constitutional Interpretation: Yong Vui Kong v. Public Prosecutor" (2010) Singapore J of Legal Studies 558 at 569–70
[872] *Ibid*. See e.g. *Yong Vui Kong v Public Prosecutor* [2011] 1 LRC 642, [2010] SGCA 20 at para 59; *Taw Cheng Kong v. Public Prosecutor*, [1998] 1 SLR(R) 78 (HC), rev'd on different grounds [l998] 2SLR(R) 489 (CA); *Chng Suan Tze*, [1988] 2 SLR(R) 525 (overturned by Parliament with the Republic of Singapore (Amendment) Act 1989 (Act 1 of 1989) to restrict the court's jurisdiction).
[873] *Yong Vui Kong v Singapore (AG)*, [2011] 2SLR 1189 at para 79.
[874] See Albert, *supra* note 166 at 223 (referencing Donald S. Lutz, *Principles Of Constitutional Design*); Lorenz, *supra* 452 at 358-59; Principe, *supra* note 452.
[875] See *The Constitution of the Republic of Singapore* (1985 Rev Ed) art 5 (art 8 involves the electors, but this only applies to surrendering sovereignty, the police force, or the armed forces).
[876] See Lee Strang, "Originalism's Promise, and Its Limits" (Paper delivered at Symposium: History and the Meaning of the Constitution, 2014) 63 Clev St L Rev 81 at 82–83 ("Nonoriginalism includes a diverse collection of scholars who argue that factors other than, or in addition to, the Constitution's original meaning should govern constitutional interpretation" at 82–83)
[877] See The Federalist No 49 (Alexander Hamilton or James Madison).
[878] See Mila Versteeg, "The Politics of Takings Clauses" (2015) 109 Nw UL Rev 695 at 736.

[879] See For example, adapting the takings clause and just compensation to the newer legal concepts of regulatory takings. The word "new" being relative to the Fifth Amendment's ratification.
[880] See Schultz, *supra* note 114 at 472 ("property interest gives the owner a singular and absolute control over something which no one, including the state, could violate" at 472).
[881] See *Vernon v Los Angeles (City of)*, 27 F (3d) 1385 at 1392 (9th Cir 1994)
[882] See Amendola et al, *supra* note 215.
[883] See *Boston Chamber of Commerce v Boston (City of)*, 217 US 189 at 195 (1910).
[884] See Thomas Roberts, "The USA" in Rachelle Alterman, ed, *Takings International: A comparative perspective on Land use Regulations and Compensation Rights* (USA: American Bar Association, 2010) at 215-227; *United States v. Cent Eureka Mining Co*, 357 US 155 at 168–69 (1958)
[885] See Thomas Fleiner, Alexander Misic & Nicole Töpperwien, *Constitutional Law in Switzerland* (Stämpfli, 2012) paras 115–154; Patricia Egli, *Introduction to Swiss Constitutional Law* (Zürich: Dike Verlag, 2016) at 67–75. See also Georg Müller & Felix Uhlmann, *Elemente einer Rechtssetzungslehre*, 3d ed (Zürich, Schulthess Verlag, 2013) s 10, para 434.
[886] See Bryan Chew et al, *supra* note 360 at 181.
[887] See e.g. Bernhard von Pezold & Others v Republic of Zimbabwe, ICSID Case No. ARB/10/15 (Washington DC, 2015) at para. 501–22. (redistributing land to compensate for historical wrongs failed to achieve the public purpose); ("[T]he evidence supports a conclusion that the Claimants were targeted as a result of their skin color." At para 501).
[888] See *Bill of Rights Act 1990* s 27(1)–(2); Kiener, *Grundrechte*, *supra* note 642 at 348; Bigler Olivier, "Art. 6 CEDH (volet civil) / I. - II" in *Convention européenne des droits de l'homme (CEDH), Commentaire des articles 1 à 18 CEDH* (Bern: 2018) N 39 (contending that the Convention's right to a fair trial does not apply to nuisances causing property right infringements); Walter Kälin et al, "Die staatsrechtliche Rechtsprechung des Bundesgerichts in den Jahren 2005 und 2006" (2006) 142 ZBJV 741 at 837. See generally US Const amend XIV.
[889] See BGer Oct 12, 2012, 139 BGE I 16 at 26–29; *R v Hines*, [1997] 3 NZLR 529 at 580–581 (CA).
[890] See *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171 art 51 (enter into force 23 March 1976) (The treaty is binding on state signatories); Elisabeth Wickeri, "'Land Is Life, Land Is Power': Landlessness, Exclusion and Deprivation in Nepal" (2011) 34 Fordham Int'l LJ 930 at 1006–07.
[891] See *Batton-Jackson Oil Co v Reeves*, 255 Ga 480 at 482 (1986).
[892] *Patel v Texas Dep't of Licensing & Regulation*, 469 SW (3d) 69, 87 (Tex Sup Ct 2015).
[893] See *Tennessee Wine & Spirits Retailers Ass'n v Thomas*, 139 S Ct 2449 at 2464, 204 L Ed 2d 801 (US Sup Ct 2019) (quoting *Mugler v Kansas*, 123 US 623 (1887)).
[894] See Rüssli, *supra* n ote 722 at 56.
[895] See *Louis Finocchiaro, Inc v Nebraska Liquor Control Comm'n*, 217 Neb 487 at 491, 494 (1984) (citing the state's constitutional right to property); Patel, *supra* note 893 at 86–87 (citing the state's constitutional due process clause).
[896] See Giovanni Biaggini, "Wirtschaftsfreiheit" in Daniel Thürer, Jean-Francois Auber & Jörg Paul, eds, *Verfassungsrecht der Schweiz* (Zürich: Schulthess Publishing House, 2001) at 779. See generally Ulrich Häfelin & Walter Haller, *Schweizerisches Bundesstaatsrecht*, 5th ed (Zürich: Schulthess, 2001) at 73–74; BV Title IV, Ch 2.
[897] *Matthews (Town of) v Wright*, 240 NC App 584 at 592 (2015) (quoting *Carolina Tel. & Tel. Co. v. McLeod*, 321 NC 426 at 429 (1988))
[898] *Ibid*.
[899] See "Model Eminent Domain Legislation", online (pdf): *Institute for Justice* <https://ij.org/wp-content/uploads/2020/01/01-18-2020-Model-Eminent-Domain-Legislation-for-Remediation-of-Blight-and-Necessity.pdf> at s 100.02; Minn Stat Ann § 117.025(6)–(7); ND Const Art 1, § 16; Mo Ann Stat § 523.271.
[900] *Ibid*.
[901] *Ibid*.
[902] See generally *Kramer*, *supra* note 107
[903] E.g. RLG art 2 para 1, art 30; Verordnungüber Rohrleitungsanlagen zur Beförderung flüssigeroder gasförmiger Brenn- oder Treibstoffe [RLV] [Ordinance on pipeline systems for the transport of liquid or gaseous fuels] Jun 26, 2019, SR 746.11, art 20 para 1 (Switz). See also RLG art 10 (Pipeline Act); Etienne Poltier, *Droit suisse de l'énergie* (Bern: Stämpfli, 2020) at 152.
[904] See generally Chun Peng, "Decision-Making and Scrutiny of Rural Land Expropriation in China: Conventional Wisdom and Beyond" 45 HKLJ 591 at 611–12, 615–16 (WL); Zishi Zhao, "Analysis on rationalizing chinese landless farmers' compensation" (Master Thesis, University of Nevada, Reno, 2007) [unpublished] (ProQuest) at 62–64, 75 (Strong parliamentary discretion or the executive determining the public purposes can replicate China's expropriation regime) ("the compensation amount is between only 2.81 and 6.36 percent of the land market value"

for land the farmer kept but other comrades were entitled to use or receive dividends from the land's output at i, 13–14).
[905] See Riva, "§ 48 Eigentumsgarantie", *supra* note 625 at 765–66.
[906] *Ibid* at 772 (discussing G. Müller, *Privateigentum* (Anm. 17), at 61 ff) BGer Jan 21, 1976, 102 BGE Ia 104 s 5a at 116; BGer Apr 4, 1973, 99 BGE Ia 604 s III.6e at 627.
[907] See *Wilkinson v Leland*, 27 US 627 at 657 (1829) (The fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred).
[908] See *Agricola v Harbert Constr Corp*, 310 So (2d) 472 at 475 (Ala Sup Ct 1975); 53 Pa Stat Ann § 10603.1 (WL) (zoning ordinances receive strict construction favoring the property owner); Dana Berliner, "Strict Construction in Eminent Domain Statutes" (2018) 34:5 Practical Real Estate Lawyer 25 (Finding most states construe statutes conferring eminent domain power in the landowner's favor. Finding New Mexico and South Dakota, two states highly ranked for their property rights, have been silent on the question whether strict construction favoring the landowner applies to eminent domain cases) [Berliner, "Strict Construction"]
[909] Javier Portillo, "The Impact of Bargaining Delays under the Threat of Eminent Domain." (2018) 58:2 J Regional Science 451 at 451.
[910] See William Strange, "Information, Holdouts, and Land Assembly" (1995) 38:3 J Urban Economics 317 at 318.
[911] *Ibid* at 332.
[912] See Carol Necole Brown, "Justice Thomas's Kelo Dissent: The Perilous and Political Nature of Public Purpose" (2016) 23 Geo Mason L Rev 273 at 290; Thomas Merrill, "The Economics of Public Use" (1986) 72 Cornell L Rev 61 at 75.
[913] See William Fischel, "The Offer/Ask Disparity and Just Compensation for Takings: A Constitutional Choice Perspective" (1995) 15:2 Int'l Rev L & Economics 187 at 187–188.
[914] See e.g. Steven Shavell, "Eminent Domain Versus Government Purchase of Land Given Imperfect Information About Owners' Valuations" (2010) 53 JL & Econ 1 at 4 (an honest holdout occurs when the landowner refuses to sell the land for less than the property's true value, which was offered); Posner, *supra* note 51 at 55.
[915] See "APA Dictionary of Psychology: Anchoring Bias" (2020), online: *American Psychological Association* <https://dictionary.apa.org/anchoring-bias> ("the tendency, in forming perceptions or making quantitative judgments under conditions of uncertainty, to give excessive weight to the starting value (or anchor), based on the first received information or one's initial judgment, and not to modify this anchor sufficiently in light of later information").
[916] See Artie Zillante, Dustin Read & Michael Seiler. "Using Prospect Theory to Better Understand the Impact of Uncertainty on Real Estate Negotiations" (2019) 41:1 J Real Estate Research 75 at 79 ("anchoring, confirmation, and feedback heuristics, as well as endowment and familiarity biases, which have all been shown to influence the value ascribed to properties" at 79)
[917] See Strange, *supra* note 910 at 331–32
[918] *Ibid*.
[919] See Portillo, *supra* note 909 at 470.
[920] See e.g. Carl Kitchens "The use of eminent domain in land assembly: The case of the Tennessee Valley Authority" (2014) 160:3–4 Public Choice 455–466.
[921] Richard Epstein, "A Clear View of the Cathedral: The Dominance of Property Rules" (1997) 106 Yale LJ 2091 at 2102 [Epstein, "A Clear View of the Cathedral"].
[922] See Nicole Stelle Garnett, "The Public-Use Question As A Takings Problem" (2003) 71 Geo Wash L Rev 934 at 958–59; Daniel Kelly, "The "Public Use" Requirement in Eminent Domain Law: A Rationale Based on Secret Purchases and Private Influence" (2006) 92 Cornell L Rev 1 at 37 ("In Poletown, the city of Detroit transferred the land to General Motors for $8 million, even though the estimated cost of the project to the public was $200 million. Similarly, in Cousins Island, Maine, the state seized a parking lot near a ferry landing from one private owner and leased the lot to the ferry owner for the same use for one dollar per year. Finally, in Corona, California, the city promised to acquire and sell four parcels of land for one dollar to a developer, who would also receive $1 million in tax rebates" at 37).
[923] See Marc Hequet, "Life After Kelo, Retail Traffic" (1 June 2006), online: *National Real Estate Investor* <https://www.nreionline.com/mag/life-after-kelo> ("In the past, developers assembling sites used the threat of eminent domain as leverage in negotiations with holdout residents or small-business owners. The threat alone was enough to force landowners to the bargaining table and save developers from having to pay exorbitant prices to get the last piece of the puzzle"); Thomas Miceli & Kathleen Segerson, "A Bargaining Model of Holdouts and Takings" (2007) 9:1 Am L & Economics Rev 160 at 169–73.

[924] Thomas Miceli & Kathleen Segerson, "A Bargaining Model of Holdouts and Takings" (2007) 9:1 Am L & Economics Rev 160 at 162, 168, 173 (the threat of expropriation causes landowners to negotiate, regardless of the landowner's pertinacity).
[925] See Alessandro Marchesiani & Ed Nosal, "Private Takings" (2017) 19:3 Journal of Public Economic Theory 639 at 641
[926] *Ibid* at 649, 653. Daniel Kelly, "The 'Public Use' Requirement in Eminent Domain Law: A Rationale Based on Secret Purchases and Private Influence" (2006) 92 Cornell L Rev 1 at 48–49.
[927] See Epstein, "A Clear View of the Cathedral", *supra* not 921 at 2113–14 ("In essence, the public use requirement was met, not because of the public nature of the end use, but because the holdout problem required a switch from the property [rights] rule to a constrained liability rule" at 2114).
[928] See Thomas Miceli, "Free Riders, Holdouts, and Public Use: A Tale of Two Externalities" 148:1–2 Public Choice 105 at 115.
[929] See e.g. BGer Apr 1, 1987, 113 BGE Ia 126 at 132–34.
[930] Pierre Moor, François Bellanger & Thierry Tanquerel, *Droit administratif, Volume III : L'organisation des activités administratives. Les biens de l'Etat*, 2nd ed (Bern: 2018) at 779.
[931] *Ibid* at 780.
[932] See e.g. *Kohl Indus Park Co v Rockland Cty*, 710 F (2d) 895 at 901 (2d Cir 1983) (the New York Constitution Art. 1, § 7 disallows the practice); *Carlsbad (City of) v Ballard*, 71 NM 397 at 399, 378 P (2d) 814 at 815 (1963) (the condemnation of any property more than is actually needed for public use is a denial of due process of law" at 815). See Mark Dennison, American Jurisprudence Proof of Facts (Thomson Reuters, 2003) vol 71 at 97ff (WL).
[933] See *Kelo*, *supra* note 66 at 489 (quoting Berman, 348 US 26 at 35–36 (1954)).
[934] Fla Stat Ann § 337.27(2) (State Public Transportation Power); Fla Stat Ann § 127.01(1)(b) (County Power). See e.g. *Woolley v State Highway Comm'n*, 387 P (2d) 667 at 672, 674–75 (Wyo Sup Ct 1963).
[935] See *Seaton v Minister for Land Information*, [2013] 3 NZLR 157 at paras 23–24, 26 (SC).
[936] See *Galstaun and Another v Singapore (AG)*, [1980] SGHC 17, [1980–1981] SLR 345 at para 8.
[937] See LAA s 10(1)(a); Lim Chin Joo "Compulsory Land Acquisition In Singapore" (1968) 10:1 Malaya L Rev 1 at 6 (JSTOR).
[938] *Coster v Tide Water Co*, 18 NJ Eq 54 at 63 (Ch), aff'd, 18 NJ Eq 518 (1866) ("the right of private property was made sacred by the constitution, to be invaded by no one, not even the legislative power, except where such control was expressly given by that instrument" at 63).
[939] See David Hofstetter, *Das Verhältnismässigkeitsprinzip als Grundsatz rechtsstaatlichen Handelns (Art. 5 Abs. 2 BV), Ausgewählte Aspekte* (Zürich: Schulthess Publishing House, 2014) (ZStöR 216), at 275–76, 295–96.
[940] See Duncan Kennedy, "The Critique of Rights in Critical Legal Studies" in Wendy Brown & Janet Halley, eds, *Left Legalism/Left Critique* (Durham: Duke U Press, 2002) at 202.
[941] *Ibid*.
[942] See Arnold Marti, *Grundsätze und Begriffe: Formelle und materielle Enteignung, volle Entschädigung* (2015) 3 BlAR 141 at 148.
[943] See Pierre Tschannen, *Staatrecht der Schweizerischen Eidgenossenschaft*, 4th ed (Bern: Stämpfli, 2016) at 143–44.
[944] See Dominique Hänni, *Vers un principe d'intégrité de l'administration publique, La prévention de la corruption en droit administratif* (Geneva: 2019) at 360, 362.
[945] See Rainer Schweizer, "Art. 36" in Bernhard Ehrenzeller et al, eds, *Die schweizerische Bundesverfassung, St. Galler Kommentar*, 3rd ed, (Zürich: 2014) N 34; *Berman v Parker*, 348 US 26 at 32 (1954); *City Developments Ltd v Chief Assessor*, [2008] SGCA 29 at para 9 (quoting Halsbury's Laws of Singapore, vol 1, *Administrative and Constitutional Law* (Butterworths Asia, 1999) at para 10.029); *Basco Enterprises (Pte) Ltd v Soh Siong Wai*, [1989] SGCA 14 at para 13. See generally the principle of *sic utere tuo ut alienum non laedas* ("everyone's right of freedom of action as long as they don't interfere with the security rights of others"); *Smith v Applegate*, 23 NJL 352 at 357 (1852) ("It is equally a matter of public policy that such roads as are unnecessary and injurious should not be laid out. They are to be opened and maintained at the public expense. The opening, therefore, of an unnecessary road is a public injury, no less than a wrong to the individuals whose property is immediately affected. It increases needlessly the public expenditure and the burthen of taxation" at 357).
[946] See Kruckeberg, *supra* note 133 at 567. *Cf Midkiff*, *supra* note 141 at 242.
[947] See Berliner, "Strict Construction", *supra* note 908.
[948] See *Urban Development Act* s 252(1)(b)(i).

[949] James Ely, Jr, "Post-Kelo Reform: Is the Glass Half Full or Half Empty?" (2009) 17 Sup Ct Econ Rev 127 at 136 (defining the threat or intended benefit of these broad purposes, limiting the public use's scope). See e.g. *Kelo, supra* note 66 at 476, 490, 477.
[950] See Erik Knutsen, "The Cost of Costs: The Unfortunate Deterrence of Everyday Civil Litigation in Canada" (2010) 36 Queen's LJ 113 at paras 28, 37–37, 84–85. See generally Michael Gentithes, "Precedent, Humility, and Justice" (2012) 18 Tex Wesleyan L Rev 835 at 891 fn 83 (arguing that lower courts will strongly rely on higher-court pronouncements than to deviate from statute on a policy preference or moral judgment.).
[951] Jean-Jacques Rousseau, "The Social Contract" in Michael Freeman, ed, *Lloyd's Introduction to Jurisprudence*, 9 ed (London, UK: Sweet & Maxwell, 2014) 134 at 137.
[952] *Sw Illinois Dev Auth v Nat'l City Envtl, LLC*, 199 Ill (2d) 225 at 237 (Il Sup Ct 2002).
[953] See Kruckeberg, *supra* note 133 at 567, 582.
[954] See Julian Juergensmeyr, et al, *supra* note 179 s 16:6.
[955] See Walter Block, *Property Rights: The Argument For Privatization* (Palgrave Macmillan, 2019) at 228; Restrepo Ochoa, et al, "Expropriation Risk, Investment Decisions and Economic Sectors" (2015) 48 Economic Modelling 326 at 340 ("when the business is essential for the functioning of the economy, there is a greater welfare gain with a private, more efficient firm operating the business than in the case where the business is not essential. Therefore, creating a threat to expropriate is also more costly in terms of welfare for essential businesses" at 340).
[956] See generally Walter Block, *Property Rights: The Argument For Privatization* (Palgrave Macmillan, 2019) at 228; Donald Featherstun, D Whitney Thornton II, J Gregory Correnti, "State and Local Privatization: An Evolving Process" (2001) 30 Public Contract LJ 643 at 648–51 (brief discussion of the benefits and detriments of privatization); Brian Clemow, "Privatization and the Public Good" (1992) 43:6 Labor Law Journal 344–349.
[957] See *Berman v Parker*, 348 US 26 at 33 (1954); *Kelo*, *supra* note 66 at 484.
[958] See *Kelo*, *supra* note 66 at 521.
[959] See Paul Kline, "Publicly-Owned Landfills and Local Preferences: A Study of the Market Participant Doctrine" (1992) 96 Dickinson L Rev 331 at 351 (citing *Reeves, Inc v Stake*, 447 US 429 at 444 (1980)); See also Christopher Reagen & John D Fognani, "Mining rights and title in USA" (4 July 2019), online: *Lexology* <https://www.lexology.com/library/detail.aspx?g=4903337f-9524-45e3-84fe-80b5580a830d>.
[960] See generally Kline, *supra* note 959.
[961] E.g. EntG arts 2–3, 43; Bundesgesetzbetreffend die elektrischen Schwach-und Starkstromanlagen [EleG] [Federal law pertaining to low-voltage and high-voltage electrical systems] Jun 24, 1902, SR 734.0, art. 43 (Switz); Bundesgesetzüber die Nutzbarmachung der Wasserkräfte [WRG] [Federal Law on the utilization of hydropower] Dec 22, 1916, SR 721.80, art 46 (Switz); Eisenbahngesetz [EBG] [Railway Act] Dec 20, 1957, SR 742.101, art 3 (Switz).
[962] See Liebmann, *supra* note 52 at 2–3. Land Readjustments are not found in Studied Nations and consequently will not be further discussed in this Thesis. It is outside the scope of this Thesis. See also Brandon Gerstle, "Giving Landowners the Power: A Democratic Approach for Assembling Transmission Corridors" (2014) 29 J Envtl L & Litig 535 at 560–63; Michael Shultz & Frank Schnidman, "The Potential Application of Land Readjustment in the United States." (1990) 22:2 The Urban Lawyer 197 at 224.
[963] See Liebmann, *supra* note 52 at 2–3 ("The scheme makes possible redevelopment without the necessity of raising funds for land acquisition and carrying costs. So long as the scheme is approved by public authority and provides adequate compensation for dissenters, it presents no constitutional difficulties" at 2–3) (Some land may be mortgaged or converted into a public area to finance the project); Gerhard Larsson, "Land Readjustment: A Tool for Urban Development" (1997) 21:2 Habitat Int'l 141 at 142.
[964] See Gerstle, *supra* note 962 at 563.
[965] See *Coleman v Chevron Pipe Line Co*, 94-1773 (La App Ct 4 Cir 4/24/96), 673 So (2d) 291 at 295–96, writ denied, 96-1784 (La 1996), 681 So. 2d 1259.
[966] *Cf* La Const Ann art I, § 4(H)(1) (this constitutional provision was designed to prevent expropriation-leasebacks.); See e.g. *Berman v Parker*, 348 US 26 at 30 (1954).
[967] See Thomas Colby & Peter Smith, "The Return of Lochner" (2015) 100 Cornell L Rev 527 at 593–96.
[968] See Riva, "Art. 5 Ausgleich und Entschädigung", *supra* 645 NN 160, 165. *Contra* e.g., *Penn Cent. Transp Co v New York (City of)*, 438 US 104 at 133 (1978).
[969] See *Apfel*, *supra* 187 at 522–23; See also *Armstrong v United States*, 364 US 40 at 49 (1960); *Schmude Oil, Inc v Dep't of Env't Quality*, 306 Mich App 35 at 53 (2014) (company was not singled out, which would have been a burden).
[970] See Premia, or the plural form of premium, is a percentage or amount of money above the fair market value of the land – the general measurement of a compensation award for expropriated realty. See generally Epstein,

"Takings", *supra* note 47 at 184 (1985) ("The bonus could correct, however, for the persistent bias of the market value test, even as it generates overcompensation in some cases while tolerating undercompensation in others" at 184).

[971] Switzerland's Federal Government's banned the cantons from increasing the compensation award for expropriations above the federal amount in the past. Riva, "Art. 5 Ausgleich und Entschädigung", *supra* note 645 N 131–133; Jörg Paul Müller & Markus Schefer, "Siebtes Kapitel: Grundrechte der Eigentums- und Wirtschaftsordnung / I. Eigentumsgarantie (Art. 26 BV) / 3. Einschränkungen der Eigentumsgarantie" in: *Grundrechte in der Schweiz, Im Rahmen der Bundesverfassung, der EMRK und der UNO-Pakte*, 4th ed (Bern: 2008) at 1036–37. See e.g. BGer May 30, 2001, 127 BGE I 185 at 190–93 (citing EntG art 15 EntG and VS [the Canton of Valais Constitution]).

[972] See Der Bundesrat & Generalsekretariat, *supra* note 850 (referring to EntG Art 19(a[to])) (The Swiss federal government will require bonus compensation to expropriated farmland). See also Shai Stern, "Just Remedies" (2016) 68 Rutgers UL Rev 719 at 741 (There appears to be no material difference between a premium that is (1) a fixed percentage of fair market value or (2) a fixed dollar amount bonus to remedy the situation.)

[973] See Julian Juergensmeyr, et al, *supra* note 179 s 16:7. See e.g. *Henry v Columbus Depot Co*, 135 Ohio St 311 at 315 (1939).

[974] See e.g. *Div of Admin, State Dep't of Transp v Grant Motor Co*, 345 So (2d) 843 at 845 (Fla Dist Ct App 1977) (discussing the Florida Constitution's self-executing eminent domain clause).

[975] See Nathan Bu, "Taking Stock: Exploring Alternative Compensation in Eminent Domain" (2018) 49 Colum Hum Rts L Rev 213 at 249. New Zealand and Singapore do not have an in-kind, like-kind, payment in-kind compensation cases at the time of this writing; EntG art 17 (compensation must be cash unless otherwise provided by law or agreement); Andreas Baumann et al, "§ 142 Arten" in *Kommentar zum Baugesetz des Kantons Aargau* (Bern: 2013) N 3, 10–13 (the Canton of Aargau permitted the court to have in-kind compensation if the expropriator and condemnee agree on the in-kind exchange and the expropriator owns the similar substitute property that it plans to relinquish. at paras 10–13).

[976] See "Craft Your Personalized Ranking" (2020), online: *Cato Institute* <https://www.freedominthe50states.org/personalize> (View the sources of data for the U.S. under the "Land-Use Freedom" dropdown button); Dana Berliner, *Public Power, Private Gain: A Five-Year, State-By-State Report Examining the Abuse of Eminent Domain* (2003), online: *Castle Coalition* <http://www.castlecoalition.org/pdf/report/ED_report.pdf> at 2

[977] See "New Zealand Gazette", online: <https://gazette.govt.nz>; "Electronic Gazette", <http://www.egazette.com.sg>

[978] See Epstein, "Takings", *supra* note 47 at 184; Yun-chien Chang, "An Empirical Study of Compensation Paid in Eminent Domain Settlements: New York City, 1990-2002" (2010) 39 J Legal Stud 201 at 202, 239–40 (The pejorative holding is that a bonus mitigates undercompensated takings, which is the majority of cases in New York between 1990 through 2002, but creates a windfall for biased appraisals developed by the government's and wealthier landowners' expert witnesses); Thomas Miceli & Kathleen Segerson, "The Economics of Eminent Domain: Private Property, Public Use, and Just Compensation" (Boston: Now Publishers Inc, 2007) at 37 ("the majority will authorize fewer takings as the amount of compensation increases" at 37); Angelo Lee, *supra* note 554 at *18–19 ("removing the obligation to compensate for taken property would predictably increasethe frequency of inefficient land-use decisions by those private businesses" at *18–19).

[979] See Yun-Chien Chang, "Economic Value of Fair Market Value: What Form of Takings Compensation is Efficient" (2012) 20 Sup Ct Econ Rev 35 at 88–89.

[980] *Ibid*; Ashley Mas, "Eminent Domain Law and "Just" Compensation for Diminution of Access" (2014) 36 Cardozo L Rev 369 at 399 (citing *Thom v State*, 138 NW (2d) 322, 328 (Mich Sup Ct 1965) ("It has always been a basic principle of the law that, if the work is of great public benefit, the public can afford to pay for it" (citation and internal quotation marks omitted)).

[981] See *Wilkinson v Leland*, 27 US 627 at 657 (1829).

[982] See Epstein, "Takings" at 184.

[983] See Maria Maciá, "Pinning Down Subjective Valuations: A Well-Being-Analysis Approach to Eminent Domain" (2016) 83 U Chi L Rev 945 at 995–96.

[984] See Shai Stern, "Taking Community Seriously: Lessons From The Israeli Disengagement Plan" 47 Isr L Rev 149 at 160–61, 164; *The* Kelo *Decision: Investigating Takings of Homes and Other Private Property: Hearing Before the S. Comm. on the Judiciary*, 109th Cong 122 (2005) at 122 ("Congress could require that when occupied homes, businesses or farms are taken, the owner is entitled to a percentage bonus above fair market value, equal to one percentage point for each year the owner has continuously occupied the property" at 122).

[985] See generally *Peacock v Sacramento (Cty of)*, 271 Cal App (2d) 845 at 853; *Gray v Minister of Lands*, [2004] NZLVT 3 at paras 22– 23; See also *Jacobsen Holdings Ltd v Drexel*, [1986] 1 NZLR 324 at 328–329 (CA).
[986] See e.g. *TCI W End, Inc v Dallas (City of)*, 274 SW (3d) 913 at 917 (Tex App Ct 2008); *United States v Causby*, 66 S Ct 1062 at 1066 (US Sup Ct 1946) ("If, by reason of the frequency and altitude of the flights, respondents could not use this land for any purpose, their loss would be complete. It would be as complete as if the United States had entered upon the surface of the land and taken exclusive possession of it" at 1066); *Goodwyn v United States*, 32 Fed Cl 409 at 417 (1994) (entering the private property to build a permanent two-mile dyke on the property constituted a taking).
[987] See Reto Patrick Müller & Lea Bachmann, "Treu und Glauben als grundrechtliche Vermögensschutznorm?" (2020) 116 SJZ Magazine 259ff at 267.
[988] See BGer Apr 23, 1986, 112 BGE Ib 105 s 6 at 118; BGer Jun 16, 1999, 125 BGE II 431 E. 6 S. 439 (a seller attempted to convey a parcel under its current zoning classification in reliance on the municipality's conclusion that no zoning plan amendments were necessary before the land sale. The seller's extensive conveyance costs were government-reimbursable when the municipality decided to reverse its decision.). See generally Art. 9 BV (protection against arbitrary conduct and principles of good faith).
[989] See Reto Patrick Müller & Lea Bachmann, "Treu und Glauben als grundrechtliche Vermögensschutznorm?" (2020) 116 SJZ Magazine 259ff at 261–62.
[990] *Pennsylvania Coal Co v Mahon*, 260 US 393 at 415–16 (1922).
[991] *Cf Penn Cent Transp Co v New York (City of)*, 438 US 104 at 124 (1978); Stephen Durden, "Unprincipled Principles: The Takings Clause Exemplar" (2003) 3 Ala Civil Rights & Civil Liberties L Rev 25 at 67; Thomas Miceli & Kathleen Segerson, "The Economics of Eminent Domain: Private Property, Public Use, and Just Compensation" (Boston: Now Publishers Inc, 2007) at 3 ("From an economic perspective, there is no substantive difference between a government action that involves an outright seizure of property for purposes of providing a public good, and one that merely regulates that property for purposes of preventing an external harm" at 3).
[992] See Epstein, "Takings", *supra* note 47 at 273.
[993] See BGer May 8, 1974, 100 BGE Ib 71 at 75 (citing the EntG art 92); BGer Sept 22, 1976, 102 BGE Ib 182 at 185–86 (like-kind exchange, which is subject to a capital gains tax); BGer Mar 6, 1968, 94 BGE I 111 p. 116–17 (holding a capital gains tax on the compensation award as not confiscatory taxation).
[994] *Contra* e.g. *Dromgool v Minister for Land Information*, [2019] NZHC 1563 at para 74; BVGE Jul 25, 2017, A-1351/2017 at para 10.
[995] *Contra* e.g. *Dromgool*, *supra* at paras 69–75.
[996] See Tex Prop Code Ann § 21.103(b); Ky Rev Stat Ann § 416.670(1); NH Rev Stat § 498-A:12(I).
[997] The landowner can contract out of the buyback in Switzerland without a compensation bonus.
[998] If the landowner believes the government has failed to negotiate in good faith to reach a settlement agreement on the compulsory acquisition, the landowner may file an objection with the Environment Court per s 23(3) of the Public Works Act. See generally *Gibbs v New Plymouth District Council*, [2011] CIV-2011-443-529; BC201165247.
[999] See Daniel Kelly, "Pretextual Takings: Of Private Developers, Local Governments, and Impermissible Favoritism" (2009) 17 Sup Ct Econ Rev 173 at 228–29.
[1000] See Norman Williams, Jr, & John Taylor, *American Land Planning Law*, Rev Ed, (Thomson Reuters, 2020) vol 1 § 6:18.50.
[1001] See generally Gerard McMeel, *McMeel on the Construction of Contracts: Interpretation, Implication, and Rectification*, 3rd ed (Oxford: Oxford U Press, 2017) at 306–07 (the presumption applying to arbitration disputes; private parties would want matters resolved in one-court). New Zealand and Switzerland have bifurcated the courts to certain expropriation claims or jurisdiction, but they do not appear to have access to justice issues.
[1002] See James Lester, Jr, *Understanding Perceived Fairness in Eminent Domain: The Case of Texas Energy Pipelines* (PhD Dissertation, Ashford University, 2019) at 89, 111 [unpublished] (ProQuest).
[1003] See Denton, "Using Eminent Domain for Pipelines? That's Right of Way Done Wrong", *Wall Street Journal* (12 April 2013), online: *WSJ* <https://www.wsj.com/articles/SB10001424127887324504704578409122218081596>. See e.g. Julie Turkewitz, "Army Approves Construction of Dakota Access Pipeline", *New York Times* (7 February 2017); Kris Maher & Alison Sider, "U.S. Agencies Order Dakota Access Pipeline Work Halted After Judge Rules It Can Proceed", *Wall Street Journal* (Sept. 9, 2016), online: *WSJ* < https://www.wsj.com/articles/judge-rules-3-8-billion-dakota-access-pipeline-can-proceed-1473450128>.
[1004] See "Global Competitiveness Report 2019", *supra* note 1 at 633-634, 638.

[1005] See Lauri Sääksvuori et al "A Neural Signature Of Private Property Rights" (2016) 9:1 *J Neuroscience, Psychology & Economics* 38 at 38, 47; Gregory Mandel, Kristina Olson & Anne Fast, "Debunking Intellectual Property Myths: Cross-Cultural Experiments on Perceptions of Property" (2020) 2020 BYUL Rev 219 at 225.
[1006] See Somin, "Limits of Backlash", *supra* note 120 at 2118.
[1007] See William Ruger & Jason Sorens, "Land" (2018), online: *Cato Institute* <https://www.freedominthe50states.org/land>.
[1008] *Kohl v United States*, 91 US 367 at 373 (1875).
[1009] See *Public Prosecutor v Kwong Kok Hing*, [2008] SGCA 10, [2008] 2 SLR 684 at para 17 (Singapore has more communitarian values in its legal system and its country's founding than the U.S.).
[1010] See Hofstede Insights, "Country Comparison", *supra* note 430 (the recent Hofstede Insight research finds the U.S. and Switzerland as having more masculine oriented cultures. Masculinity is the only category where the U.S. and Switzerland distinguish themselves from New Zealand and Singapore).
[1011] *Supra* note 462.
[1012] See Kiener, *Grundrechte*, *supra* note 642 at 40.
[1013] *Ibid* at 35, 42.
[1014] See J Michael Martinez & William Richardson, "The Federalist Papers and Legal Interpretation" (2000) 45 SD L Rev 307 at 317–18 (2000).
[1015] The Federalist No. 51 (Alexander Hamilton or James Madison).
[1016] See Robert Dahl, *How Democratic Is the American Constitution* (New Haven: Yale U Press, 2001) at 7.
[1017] See The Federalist No. 10 (James Madison). See also Yasmin Dawood, "Election Law Originalism: The Supreme Court's Elitist Conception of Democracy" (2020) 64 St Louis ULJ 609 at 618–19 (quoting *The Mind Of The Founder: Sources of the Political Thought of James Madison* ed by Marvin Meyers (U Press of New England, 1981) at 395) ("Allow the right [to vote] exclusively to property, and the rights of persons may be oppressed. The feudal polity alone sufficiently proves it. Extend it equally to all, and the rights of property or the claims of justice may be overruled by a majority without property, or interested in measures of injustice" at 619).
[1018] David Schultz, "The Case for A Democratic Theory of American Election Law" (2016) 164 U PA L Rev Online 259 at 265; The Federalist No. 63 (Alexander Hamilton or James Madison) (separation of powers resists the passions of the majority since the government officer would not need to fear backlash); The Federalist No. 51 (Alexander Hamilton or James Madison).
[1019] See The Federalist No. 57 (Alexander Hamilton or James Madison) (Based on the Framer's findings, the American system was farm more representative, with more people being eligible to vote, than the British House of Commons at the time).
[1020] See *Ibid* (the Framers argue that the U.S. voting system has more eligible and participating voters than the British system at the time); Neil Johnston, "The History of the Parliamentary Franchise" (1 March 2013), online: *UK Parliament* < https://commonslibrary.parliament.uk/research-briefings/rp13-14/> at 6–9 (Explaining the British voting system in the 1700s and the huge disparity in voting eligibility. Voting was restricted to males owning property worth 40 shillings, and residing in the county or was a member of a corporation in the county); *The Records of the Federal Convention of 1787* ed by Max Farrand (New Haven: Yale U Press, 1966) vol 1 at 376 (concerning Pierce Butler) ("where men got into Parl[iament] that they might get offices for themselves or their friends. This was the source of the corruption that ruined their Gov[ernment]" at 376).
[1021] Lawrence Lessig, "Corrupt and Unequal, Both" (2015) 84 Fordham L Rev 445 at 452; The Federalist No. 41 (James Madison) (The British "electors are so corrupted by the representatives, and the representatives so corrupted by the Crown").
[1022] See Philip C. Kissam, *Alexis De Tocqueville and American Constitutional Law: On Democracy, the Majority Will, Individual Rights, Federalism, Religion, Civic Associations, and Originalist Constitutional Theory* (2007) 59 Me L Rev 35 at 52–53.
[1023] See Alexis de Tocqueville, *Democracy in America*, translated by Harvey Mansfield & Delba Winthrop, (Chicago: U Chicago Press 2000) (1835) at 146, 276. Tocqueville may have mirrored Thomas Jefferson's writings. See Thomas Jefferson, *Notes on the State of Virginia* (1785) at 126, online: *University of North Carolina* <https://docsouth.unc.edu/southlit/jefferson/jefferson.html> ("All the powers of government [in a pure democracy], legislative executive, and judiciary, result to the legislative body. The concentrating these in the same hands is precisely the definition of despotic government. … One hundred seventy-three despot[legislators] would surely be as oppressive as one [dictator]" at 126).
[1024] Kissam, *supra* note 1022 at 53. See also Tocqueville, *supra* note 1023 at 235, 271 (emphasis added) ("I do not know any country where, in general, less independence of mind and genuine freedom of discussion reign than in America" at 271).

[1025] See James Madison, *The Mind of The Founder: Sources of The Political Thought of James Madison*, ed by Marvin Meyers (U Press of New England, 1981) at 395. See also The Federalist No. 10 (James Madison); The Federalist No. 51 (James Madison).
[1026] The Federalist No. 10 (James Madison) (emphasis asdded). See e.g. Perry Ferrell, "Titles for me but not for thee: Transitional gains trap of property rights extension in Colombia" (2019) 178:1–2 Public Choice 95 at 100, 108–09 (Formalizing property title was one of the causes of a Colombian Civil War, and unequal property rights or poor protections are difficult to cure).
[1027] Jennifer Nedelsky, *Private Property and the Limits of American Constitutionalism: The Madisonian Framework and Its Legacy* (Chicago: U of Chicago Press, 1990) at 25, 125.
[1028] Donald Maletz, "Tocqueville's Tyranny of the Majority Reconsidered" (2002) 64:3 The Journal of Politics 741 at 756 ("The nearer prospect of tyranny lies within the states, which are closer to the populist roots of American democracy and where most issues of domestic politics are addressed" at 753). See e.g. NZ, *Hansard*, Debate: Resource Management Amendment Bill (No 2) — First Reading (Volume: 607; Page: 4299) 20 March 2003 (Hon Ken Shirley & Jill Pettis), online: *New Zealand Parliament* <https://www.parliament.nz/en/pb/hansard-debates/rhr/document/47HansS_20030320_00001065/shirley-ken-resource-management-amendment-bill-no-2> (New Zealand Parliament encountered this during a speech raising landowners' concerns about the government taking resources without compensation. The speaker was immediately interrupted upon mentioning the word "compensation" with the rebuttal: "Some of us care about the whole of the country." The ad hominem illustrated Tocqueville's conclusions; property owner concerns were impure, unnationalistic, or frivolous to the political majority.)
[1029] See Thomas Jefferson, "Letter from James Madison to Thomas Jefferson, October 17, 1788" in Jack Rakove, *Declaring Rights: A Brief History with Documents* (USA: Bedford Books, 1998) 160 at 161–162 (1998); Dahl, *supra* note 1016 at 34–35 (Even as Madison's views evolved, he acknowledged the threat).
[1030] See *Kelo*, *supra* note 66 at 496, 505 (quoting James Madison).
[1031] See William Fischel & Perry Shapiro, "Takings, Insurance, and Michelman: Comments on Economic Interpretations of Just Compensation Law" (1988) 17:2 J Leg Stud 269 at 292–293; G Palmer, "New Zealand Bill of Rights Act", *supra* note 446 at 187 (2016) (a leaning towards judicial supremacy may solve the majoritarian issue)
[1032] See Thio Li-ann, *A Treatise on Singapore Constitutional Law* (Academy Publishing, 2012) at 43, para 01.116 ("Judicial Review is ... a counter-majoritarian check [that] institutionalises limited government, subjecting the legislature and executive to constitutional constraints, and affording protection for minorities against possible majoritarian tyranny" at 43).
[1033] See Anina Weber, *Schweizerisches Wahlrecht und die Garantie der politischen Rechte, Eine Untersuchung ausgewählter praktischer Probleme mit Schwerpunkt Proporzwahlen und ihre Vereinbarkeit mit der Bundesverfassung* (Zürich: Schulthess Verlag, 2016) (ZStöR 240) at 11. See generally Jeffrey Rosen, "America is Living James Madison's Nightmare", *The Atlantic* (2018), online: <https://www.theatlantic.com/magazine/archive/2018/10/james-madison-mob-rule/568351/> ("What would Madison make of American democracy today, an era in which Jacksonian populism looks restrained by comparison? Madison's worst fears of mob rule have been realized—and the cooling mechanisms he designed to slow down the formation of impetuous majorities have broken.")
[1034] See Weber, *supra* note 1033 at 11 (referencing Die Mediationsakte (19 February1803)).
[1035] See Kevin Yl Tan & Thio Li-Ann, *Constitutional Law in Malaysia and Singapore*, 3rd ed, (LexisNexis: 2010) at 325 (quoting Fareed Zakaria, *Culture is Destiny: A conversation with Lee Kuan Yew* (1994) 73:2 Foreign Affairs 109)
[1036] See Peter DeScioli & Scott Bokemper, "Intuitive Political Theory: People's Judgments About How Groups Should Decide" (2019) 40:3 Political Psychology 617 at 617, 632.
[1037] See Jon Elster, "On Majoritarianism and Rights" (1992) 1:3 E Eur Const Rev 19 at 21 (the majority could confiscate wealth from the minority to further its economic interests). Maletz, *supra* note 1028 at 758–59 ("The worst outcome would be a majority tyranny in which government would be nothing other than the tool of willful majorities and in which all freedom of thought and spirit would be quietly suppressed" at 758–59).
[1038] See Jorge Martinez-Vazquez, "Renters' Illusion or Savvy?" (1983) 11:2 Public Finance Quarterly 237 at 238, 244.
[1039] *Ibid*.
[1040] See J Ronnie Davis, "On The Incidence of Income Redistribution" (1970) 8 Public Choice 63 (ProQuest) (A system where only taxpayers can vote only reduces the probability of occurrence. at 63).
[1041] See Kwami Adanu et al, "Voter decisions on eminent domain and police power reforms" (2012) 21:2 J Housing Economics 187 at 188–89, 193 ("high educational attainment has been determined to be positively correlated to

liberal ideological positions" at 189); See also Andrew Morriss, "Symbol or Substance? An Empirical Assessment of State Responses to Kelo" (2009) 17:1 Supreme Court Economic Review 237 at 237, 344, 261, 271.
[1042] See Thomas Miceli & Kathleen Segerson, "The Economics of Eminent Domain: Private Property, Public Use, and Just Compensation" (Boston: Now Publishers Inc, 2007) at 40;
[1043] See Daniel Kelly, "Strategic Spillovers" (2011) 111 Colum L Rev 1641 at 1717 ("[I]t is often less expensive for an assembler to convince a local government to exercise eminent domain on its behalf than to purchase the parcels in the real estate market" at 1717); Martinez-Vazquez, *supra* note 1038 at 238, 244; Carol Miller & Stanley Leasure, "Post-Kelo Determination of Public Use and Eminent Domain in Economic Development Under Arkansas Law" (2006) 59 Ark L Rev 43 at 60 ("Both Berman and Midkiff involved the taking and redistribution of privately-owned property to other private parties. Such takings, when approved by the Court, lead to an increase in 'the scope of this unconstrained power of eminent domain to all circumstances' by deferring to a state's police powers that have inappropriately been equated to the state's power of eminent domain" at 60).
[1044] See Richard Briffault, "The Contested Right to Vote" (2002) 100 Mich L Rev 1506 at 1510–11.
[1045] *Ibid*.
[1046] See Riva, "§ 48 Eigentumsgarantie", *supra* note 625 at 765–66; Auer, *supra* 624 at 417.
[1047] See Stewart Sterk, "The Federalist Dimension of Regulatory Takings Jurisprudence" (2004) 114:2 Yale LJ 203 at 215, 252, 270–71 (Finding the Supreme Court deferring to State and Local Governments to answer and shape the Federal Court's eminent domain jurisprudence).
[1048] *New State Ice Co v Liebmann*, 285 US 262 at 311 (1932) (emphasis added).
[1049] See The Federalist No 10 (James Madison) ("A rage for paper money, for an abolition of debts, for an equal division of property, or for any other improper or wicked project, will be less apt to pervade the whole body of the Union than a particular member of it; in the same proportion as such a malady is more likely to taint a particular county or district, than an entire State.")
[1050] "According to the Tiebout Hypothesis, local governments are in direct competition with each other to attract residents. The terms of the competition are the particular mix of services and taxes that the local government can offer. All else being equal, a town with better schools will see demand for its property increase, and thus its property values rise. Conversely, a town that charges higher property taxes will see the opposite. Indeed, empirical studies confirm that property taxes are capitalized almost fully into property values so that an increase in property taxes results in a corresponding decrease in property values." Christopher Serkin, "Local Property Law: Adjusting the Scale of Property Protection" (2007) 107 Colum L Rev 883 at 899 (citing Charles Tiebout, "A Pure Theory of Local Expenditures" (1956) 64 J Pol Econ 416 at 417–20).
[1051] See Abraham Bell & Gideon Parchomovsky, "Of Property and Federalism" (2005) 115:72 Yale LJ 74 at 96.
[1052] *Ibid*
[1053] See generally *Ibid* at 98 (discussing the supply side of property law).
[1054] *Ibid* at 99; Jason Sorens, "The effects of housing supply restrictions on partisan geography" (2018) 66 Political Geography 44 at 44, 53–54 (Urban planning may influence people who care about property rights to leave the city center, embellishing the number of people who stay and accept the grander municipal power); Christopher Serkin, "Local Property Law: Adjusting the Scale of Property Protection" (2007) 107 Colum L Rev 883 at 948.
[1055] See Bell, *supra* note 1051 at 99–101 ("[I]f property forms can be freely taken advantage of in every jurisdiction, interest groups will be able to defeat complete abolition a [bad] property from by winning in a single jurisdiction" at 100).
[1056] See Larry Ribstein, "From Efficiency to Politics in Contractual Choice of Law" (2003) 37 Ga L Rev 363 at 394–96, 457–58.
[1057] See Christopher Serkin, "Local Property Law: Adjusting the Scale of Property Protection" (2007) 107 Colum L Rev 883 at 910–11.
[1058] See Kissam, *supra* note 1022 at 60–61 (Tocqueville appreciated more active municipal legal problem-solving; however, modern America's local governments "no longer resemble Tocqueville's paradigm of the New England town meeting with its small size, its homogenous polity, its substantial possibilities for citizen participation, the close accountability of public officials, and the education of citizens for participation in the larger civil society" at 61).
[1059] See Hogg, *supra* note 448 s 12.1.
[1060] See James Madison, "Property", *The National Gazette* (27 March 1792), online: *National Archives: Founders Online* <https://founders.archives.gov/documents/Madison/01-14-02-0238> ("Government is instituted to protect property of every sort; as well that which lies in the various rights of individuals, as that which the term particularly expresses. This being the end of government, that alone is a just government, which impartially secures to every man, whatever is his own.") https://press-pubs.uchicago.edu/founders/documents/v1ch16s23.html

[1061] See Mandel, *supra* note 1005 at 225–26.
[1062] See Ryan Bubb, "The Evolution of Property Rights: State Law or Informal Norms?" (2013) 56:3 J Law and Economics 555 at 558–561.
[1063] See "US Farmland % By State" (2 August 2017), online: *Math Encounters Blog* <https://www.mathscinotes.com/2017/08/us-farmland-by-state/> (Using US Department of Agriculture data); generally United States Department of Agriculture, "Farms and Land in Farms: 2019 Summary" (February 2020), online (pdf): *USDA* <https://www.nass.usda.gov/Publications/Todays_Reports/reports/fnlo0220.pdf>.
[1064] See Emily George, Emily George, "The Importance of Property Rights in the Agricultural Industry and the Role of Farm Protections Laws with These Rights" (2019) 13 Idaho Critical Legal Stud J 1 at 12, 37–38, 43.
[1065] See Richard J Cebula & Franklin G Mixcon, Jr, "The Roles of Economic Freedom and Regulatory Quality in Creating a Favorable Environment for Investment in Energy R&D, Infrastructure, and Capacity" (2014) 73:2 The American J of Economics and Sociology 299 at 304; Zackary Hawley, Juan José Miranda & W Charles Sawyer, "Land values, property rights, and home ownership: Implications for property taxation in Peru" (2018) 69 Regional Science and Urban Economics 38 at 38–39; Artyom Durnev, Vihang R Errunza & Alexander Molchanov, "Property Rights Protection, Corporate Transparency, and Growth" (2009) 40 J Intl Bus Studies 1533 at *5–6, *34–35.
[1066] See Abigail D. Blodgett, "Lessons from Oregon's Battle over Measure 37 and Measure 49: Applying the Reserved Powers Doctrine to Defend State Land Use Regulations" (2011) 26 J Envtl L & Litig 259 at 266–67.
[1067] See Tim Hoover, "Eminent Domain Reform Signed" *Kansas City Star* (14 July 2006) at B2 (reporting on Missouri's legislative eminent domain reform that gives citizens new rights when the federal government neglected property rights); Stanley Leasure & Carol Miller, "Eminent Domain-Missouri's Response to Kelo" (2007) 63 J. Missouri Bar 178 at 181 at 184; Dale Whitman, "Eminent Domain Reform in Missouri: A Legislative Memoir" (2006) 71 Mo L Rev 721 at 736–37 (Missouri replicated Singapore's strong judicial deference to the legislation unless there's fraud. "Target desired to demolish the store and replace it with a larger one, but the landlord declined to allow this. Target then enlisted the aid of a city council member . . . The city council then adopted a redevelopment plan, and the redevelopment authority appointed Target [the tenant] as the redeveloper. When the landlord refused its offer to buy the property, Target brought an eminent domain action. … Since their first redevelopment decision in 1954, they have held that the local findings must be allowed to stand unless they were arbitrary or were induced by fraud, collusion or bad faith" at 736).
[1068] See Nathan Bu, "Taking Stock: Exploring Alternative Compensation in Eminent Domain" (2018) 49 Colum Hum Rts L Rev 213 at 225–27; *Fruman v Detroit (City of)*, 1 F Supp (2d) 665 (ED Mich 1998).
[1069] See Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, in Property Rights: Eminent Domain and Regulatory Takings Re-Examined by Bruce L. Benson (The Independent Institute) at 118–19
[1070] Bernhard Heitger, "Property Rights and the Wealth of Nations: A Cross - Country Study" (2004) 23:3 Cato J 381 at 399–40 (emphasis added).
[1071] J Peter Byrne, "What We Talk about when We Talk about Property Rights - A Response to Carol Rose's Property as the Keystone Right?" (1996) 71 Notre Dame L Rev 1049 at 1058. See also Edward Erler, "The Great Fence to Liberty: The right to Property in the American Founding" in Ellen Frankel Paul & Howard Dickman, eds, *Liberty, Property, and the Foundations of the American Constitution* (Albany, NY: State University of New York Press, 1989) 43 at 44.
[1072] See Horst Feldmann, "Economic Freedom and Unemployment around the World" (2007) 74:1 Southern Economic J 158 at 171.
[1073] See Arthur Goldsmith, "Democracy, property rights and economic growth" (1995) 32:2 J Development Studies 157 at 166–67; Michael Nelson & Ram Singh, "Democracy, Economic Freedom, Fiscal Policy, and Growth in LDCs: A Fresh Look" (1998) 46(4) Economic Development and Cultural Change 677 at 690–91 (higher levels of property rights and other civil liberties significantly increases GDP growth rates).
[1074] See Artyom Durnev, Vihang Errunza & Alexander Molchanov, "Property Rights Protection, Corporate Transparency, and Growth" (2009) 40 J Intl Bus Studies 1533 at *5–6, *34–35; Vincenzo Denicolò & Luigi Alberto Franzoni, "Weak Intellectual Property Rights, Research Spillovers, and the Incentive to Innovate" (2012) 14:1 Am L & Econ Rev 111 at 112, 121, 128; Amy Pond, "Protecting Property: The Politics of Redistribution, Expropriation, and Market Openness" (2018) 30:2 Economics & Politics 181 at 182, 199–200 (EBSCOhost).
[1075] See Seth Norton, "Poverty, Property Rights, and Human Well-Being: A Cross-National Study" (1998) 18:2 Cato Journal 233 at 237–39, 243–44; Arthur Goldsmith, "Economic rights and government in developing countries: Cross-national evidence on growth and development" (1997) 32 St Comp Int Dev 29 at 41.
[1076] See Artyom Durnev & Fauver, Larry, "Stealing from Thieves: Expropriation Risk, Firm Governance, and Performance" (paper delivered at the 2nd Annual Conference on Empirical Legal Studies, 2011) (Standard & Poor's Transparency Rankings, and Credit Lyonnais Securities Asia's Governance Indicators); Artyom Durnev, Vihang R

Errunza & Alexander Molchanov, "Property Rights Protection, Corporate Transparency, and Growth" (2009) 40 J Intl Bus Studies 1533 (reflected from stock prices, financial statement disclosures); René Stulz, "The limits of financial globalization" (2005) 60:4 J Finance 1595–63 ("The limitation to governance improvements is, however, that such improvements may expose firms to more expropriation from the state" at 1629–31).

[1077] See Lorenzo Caprio, Mara Faccio & John McConnell, "Sheltering Corporate Assets from Political Extraction" (2011) 29:2 JL, Economics, and Organization 332 at 352–53.

[1078] See Richard Epstein, "Beyond the Rule of Law: Civic Virtue and Constitutional Structure" (1987) 56 Geo Wash L Rev 149 at 152.

[1079] See Mark Tushnet, Authoritarian Constitutionalism, (2015) 100 Cornell L Rev 391 at 424–25.

[1080] See Abraham Bell & Gideon Parchomovsky, "The Uselessness of Public Use" (2006) 106 Colum L Rev 1412 at 1414–15 (referencing Nobel Prize laureate Gary Becker); Harry Williams, "Property Rights and Legal Reform in Township and Village Enterprises in China", Comment, (2001) 2 Asian-Pac L & Pol'y J 227 at 257 (The author warned that rural china, which had considerable institutional corruption, would have government officials seek ill-gotten gains, assigning property ownership to themselves.)

[1081] See Heitger, *supra* note 1070.

[1082] See "Constitutional desuetude draws from the related concept of statutory desuetude, which holds that 'under some circumstances statutes may be abrogated or repealed by a long-continued failure to enforce them.'" Richard Albert, "Constitutional Amendment by Constitutional Desuetude" (2014) 62 Am J Comp L 641 at 643.

[1083] See Daniel Hinkel, *Georgia Eminent Domain* (Thomson Reuters, 2020) § 9-3.

[1084] See Xavier Sala-i-Martín, *The Global Competitiveness Report 2011-2012* ed by Klaus Schwab (Geneva, CH: World Economic Forum, 2011), online (pdf): *World Economic Forum* <http://www3.weforum.org/docs/WEF_GCR_Report_2011-12.pdf> (ranked 42). See generally Klaus Schwab & Michael Porter, *The Global Competitiveness Report 2008 – 2009* (Geneva, CH: World Economic Forum, 2008), online (pdf): *World Economic Forum* <http://www3.weforum.org/docs/WEF_GlobalCompetitivenessReport_2008-09.pdf> (ranked 40).

[1085] See Daryl Levinson, "Parchment and Politics: The Positive Puzzle of Constitutional Commitment" (2011) 124 Harv L Rev 657 at 709 at 717–18 ("Some countries have a constitutional system that is based largely on unwritten conventions and not on a single, sanctified text. Other countries have official, parchment constitutions that are mostly or entirely ignored. A written constitution can, however, help to coordinate social and political actors on a common plan of government, allowing political decisionmaking to proceed without continual fighting about the ground rules" at 709); The Federalist No. 84 (Alexander Hamilton).

[1086] See Thomson, *supra* note 847 **(**The U.S. eminent domain protections are neither poor or exceptional).

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